DECISION OF A TRIBUNAL OF SOCIAL SECURITY COMMISSIONERS

Decision

1. The decision of the Preston Appeal Tribunal of 14 May 2003 is erroneous in point of law. Accordingly, we set it aside and, using our powers under Section 14(8)(a) of the Social Security Act 1998, make the decision which the tribunal ought to have given, as follows:

The appeal against the decision of the Secretary of State dated 13 February 2003 superseding his earlier decision by which he awarded incapacity benefit is allowed. On application of the personal capability assessment to the claimant as at 13 February 2003, his score was 18 points. In particular, he attained 15 points by satisfying Descriptor 13(a), i.e. "No voluntary control over bowels". The claimant consequently remains entitled to incapacity benefit from and including 7 July 2001.

Introduction

2. This appeal raises the issue of whether a person with a properly functioning colostomy or ileostomy bag has "no voluntary control over [his] bowels" for the purposes of Descriptor 13(a) in the personal capability assessment in respect of incapacity benefit. It also raises issues over the proper approach of Commissioners to statements of law made in the Courts of Northern Ireland, where there is a parallel Commissioners' jurisdiction applying essentially identical social security regulations.

Legislation

3. Where a person has been incapable of work for 196 days in a single spell, his continued entitlement to incapacity benefit is dependent upon him satisfying the personal capability assessment ("PCA") under Section 171C of the Social Security Contributions and Benefits Act 1992 ("the Contributions and Benefits Act"). Section 171C(2) as amended provides:

> "Provision shall be made by regulations
>
> (a) defining a personal capability assessment by reference to the extent to which a person who has some specific disease or bodily or mental disablement is capable or incapable of performing such activities as may be prescribed;
>
> (b) as to the manner of assessing whether a person is, in accordance with a personal capability assessment, incapable of work".

4. Regulation 24 of the Social Security (Incapacity for Work) (General) Regulations 1995 (SI 1995 No 311, as amended) ("the 1995 Regulations") defines the personal capability assessment as:

> "...an assessment of the extent to which a person who has some specific disease or bodily or mental disablement is capable of performing the activities prescribed in the Schedule, or is incapable by reason of such disease or bodily or mental disablement of performing those activities".

5. The PCA is therefore an assessment of functionality, by reference to specified activities, which are prescribed in Regulation 25 and the Schedule to the 1995 Regulations. Leaving aside mental disabilities (which are not relevant in ths case), there are 14 activities listed, with a variety of descriptors for each. Each descriptor has a number of points allocated to it, from nil to 15. By way of example, for the activity described as "Continence" (Activity 13), the descriptors and points are as follows:

(1) Activity	(2) Descriptor	(3) Points
Continence (other than enuresis (bed wetting))	(a) No voluntary control over bowels	15
	(b) No voluntary control over bladder	15
	(c) Loses control of bowels at least once a week	15
	(d) Loses control of bladder at least once a month	15
	(e) Loses control of bowels occasionally	9
	(f) Loses control of bladder at least once a month	3
	(g) Loses control of bladder occasionally	0
	(h) No problem with continence	0

6. Regulation 25(2) provides:

> "In determining the extent of a person's incapacity to perform any activity listed in Part I he shall be assessed as if he were wearing any prosthesis with which he is fitted [or, as the case may be, any aid or appliance which he normally wears or uses]".

The words in parentheses were added by the Social Security (Incapacity for Work and Miscellaneous Amendments) Regulations 1996 (SI 1996 No 3207) ("the 1996 Regulations"), with effect from 6 January 1997.

7. If the claimant scores 15 points or more in aggregate from all physical descriptors, he satisfies the test and is entitled to the benefit.

The Facts

8. The essential facts were not in dispute.

9. The claimant suffers from a number of medical conditions, including asthma, eczema, myocardial ischaemia, arthritis and, particularly, Crohn's disease (an intestinal disease).

10. The intestines (or bowels) comprise that portion of the alimentary canal from the stomach to the anus, comprising a convoluted part extending from the stomach to the cecum (the small intestine) and a sacculated part overarching the small intestine and extending from the ileum to the anus (the large intestine). Crohn's disease is a chronic, recurrent regional inflammation of the intestines, characterised by abdominal pain and diarrhoea. It can be treated by an operation establishing an opening or stoma from the intestines through the abdomen, to divert the faecal flow from the diseased area into a fitted bag, which is external to the body. The starting point for the by-pass depends upon the location of the diseased area. Where the starting point is the ileum, the operation is known as an "ileostomy"; and where it runs from the colon, as a "colostomy" - but the effect of these two operations is identical. The person who has had the benefit of the operation in either case has no control over what flows from his body into the bag (in the sense that he cannot by any act of will stop

or otherwise affect the flow), but, of course, he has complete control over emptying the bag so that, if the bag is efficient, he can lead a virtually normal functional life.

11. In treatment of his Crohn's disease, the claimant had an ileostomy. Once fitted, he emptied the bag every two hours or so, and replaced it every second day. Although the claimant had occasional accidents, generally he became used to changing it, and it worked efficiently without leakages or other mishap.

12. As a result of his various medical problems, the claimant became incapable of work on 20 December 2000, and incapacity benefit was awarded from 7 July 2001. As indicated above, after 196 days, his continued entitlement was dependent upon him satisfying a PCA.

13. In relation to his PCA, the claimant completed a questionaire on 14 August 2002, in which he described how he considered he was affected by his various medical conditions. On 27 January 2003, he was examined by an approved doctor, who took down a medical history and carried out a physical examination. The doctor awarded 3 points for the "Bending & kneeling" activity (on the basis that the claimant sometimes could not bend or kneel as if to pick up a piece of papare from the floor, and straighten again). He noted that the claimant had had an ileostomy in the right side of his abdomen: that there was no tenderness at the site: and he had to empty the ileostomy bag every two hours. Nevertheless, in relation to continence, he chose the descriptor, "No problem with continence": and awarded no points in relation to this activity. He awarded no points under any other head, leaving the claimant with an aggregate score of only three points, less than the number required for entitlement to the benefit.

14. On 13 February 2003, a decision maker for the Secretary of State considered the matter, and accepted the doctor's assessment. As a result, he stopped the benefit from that day (formally superseding the original decision).

15. On 24 February 2003, the claimant appealed against this decision on the grounds that (i) he had to use his asthma inhaler at least three times a night, which affected his sleep, (ii) he suffered from angina (although relatively under control), (iii) his eczema of the hands affected the types of work he could do, (iv) his arthritis caused difficulties in lifting and stretching, and (v) his ileostomy required changing facilities and caused other problems.

16. On 26 February 2003, the Secretary of State (through another decision maker) reconsidered the earlier decision, but did not alter it. Consequently, the claimant's appeal moved forward to an appeal tribunal.

17. The appeal was heard on 14 May 2003, and, put shortly, the tribunal dismissed the appeal on all grounds, issuing a Statement of Reasons on 2 June.

18. The claimant sought leave to appeal to a Commissioner only on the ground that the tribunal had erred in law in the manner in which it dealt with the continence descriptor, and leave to appeal was granted by the District Chairman on 10 July 2003. It is that appeal which now falls before this Tribual of Commissioners.

19. There was oral hearing on 2 March 2004. The claimant was represented by Mr Cylok, instructed by Miss Francis, both Welfare Rights Officers with the South Ribble and Chorley Welfare Rights Team of Lancashire County Council. The Secretary of State was

represented by Mr Kenny of Counsel, instructed by Mr Scoon of the Department for Work and Pensions. We are grateful to all of the representatives for their helpful skeleton arguments and oral submissions.

The Parties' Submissions

20. Mr Cylok for the claimant relied upon two submissions, namely:

(i) A person, such as the claimant, who has fitted an ileostomy or colostomy bag falls within Descriptor 13(a), because he has "no voluntary control over [his] bowels". Such a person is therefore entitled to 15 points for that descriptor and, as those points in themselves are sufficient to satisfy the PCA, is entitled to incapacity benefit.

(ii) However, whether or not this first submission is correct, it is incumbent upon the Commissioners to follow the Northern Ireland Court of Appeal in *Perry v Adjudication Officer* (reported as an appendix to R 8/99 (IB)) in which, albeit outside the *ratio* of the case, that Court considered this very point in the context of an identical statutory provision, and found that a person fitted with a colostomy bag necessarily falls within Descriptor 13(a).

21. The Secretary of State submitted in response:

(i) A person who has an ileostomy or colostomy bag fitted has control over his bowels, because, although he cannot control the flow of faeces from his body into the bag, he can control the emptying of the bag. Far from falling within Descriptor 13(a), he falls within Descriptor 13(h), as he has no problems with continence - he does not suffer from leakage or mess, and can lead a relatively normal life, without mishap.

(ii) *Obiter dicta* of the Northern Ireland Court of Appeal are merely persuasive so far as Commissioners are concerned and, if this Tribunal of Commissioners considers the view of the Court of Appeal to be wrong, it is not bound to (and should not) follow it.

22. We propose dealing with the correct approach of Commissioners to the *Perry* case first, before considering the substantive issue raised in the appeal before us.

Perry v Adjudication Officer

23. The facts of *Perry v Adjudication Officer* were very similar to those before us, except that the claimant in *Perry* had had a colostomy rather than an ileostomy. For the reasons given above (and as the parties in the case before us accepted), this difference is of no moment.

24. In *Perry*, the date of the relevant decision (disallowing incapacity benefit) was 28 October 1996, i.e. before the 1996 Regulations took effect and therefore before Regulation 25(2) of the 1995 Regulations had been amended to include the words, "or, as the case may be, any aid or appliance which he normally wears or uses", the only reference therefore being to prostheses (see Paragraph 6 above).

25. Mrs Commissioner Brown held that the colostomy bag was a prosthesis because, although it did not replace the entire excretory opening at the end of the alimentary canal, it was a substitute for the anal sphincter (the ring of muscle which contracts to close the opening of the anus) because the bag effectively "closes the opening of the anus or final part of the bowel" (R 8/99 (IB), Paragraph 24). The bag could therefore be treated as an artificial part of the bowel and, as the claimant had voluntary control over the bag, the claimant had voluntary control over his bowels and had no problem with continence. She consequently allowed the claimant no points under Activity 13. As a result, the claimant failed to achieve the requisite aggregate points to satisfy the (then) all work test, and he was not therefore entitled to incapacity benefit

26. The Northern Ireland Court of Appeal however, allowed the claimant's appeal, holding that a colostomy bag is not a prosthesis or "an artificial substitute for a body part" (reported as an Appendix to R 8/99 (IB)). Lord Chief Justice Carswell, delivering the unanimous judgment of the Court, said of the bag:

> "[I]t is no more than a receptacle, which is very different from the anal sphincter, and we do not consider that it can readily be regarded as an artificial substutute for that. Many artificial aids clearly could not be classed as prostheses, such as wheelchairs, zimmer frames and dialysis machines. We agree with the decision of the Social Security Commissioner who held in Decision number CSIB/74/1996 that an incontinence pad is not a prosthesis, for it does not purport to be a substitute for a body part. We consider that a colostomy bag falls on the same side of the line..."

As a colostomy bag was not a prosthesis, the claimant had to be assessed for PCA (then, the all work test) purposes as if he were not wearing it. As a result, of course, he clearly fell within Descriptor 13(a), and was entitled to incapacity benefit on the basis of the 15 points achieved under that descriptor alone. That was the *ratio* of the Court of Appeal's decision.

27. However, by the time *Perry* was heard by the Court of Appeal, the 1996 Regulations had come into effect, and the Court went on to consider the position of the claimant in that case under the amended Regulation 25(2) of the 1995 Regulations. The Court considered that a colostomy bag would clearly fall within the category of "any aid or appliance which [the claimant] normally wears" and, consequently, after 6 January 1997, the claimant would have to be assessed as if he were fitted with it. Expressly because "[it] was fully argued and it is of importance to the Social Security Commissioners to have it decided", the Court of Appeal went on to express their opinion on the issue of whether the wearer of a colostomy bag had, in any event, "No voluntary control over bowels" or whether, as contended for by the Department of Social Security in Northern Ireland, he had "No problem with continence". Carswell LCJ said:

> "The appellant is able by the use of his colostomy bag to function quite satisfactorily and it was not suggested that he was handicapped in his work. We are conscious that if it is held he has no voluntary control over his bowels he will, even after the amendment effected to Regulation 25(2) takes effect, be entitled to incapacity benefit although his working ability is substantially intact, and we doubt if that was the intention of Parliament in enacting the statutory provisions. Nevertheless, we do not see any escape from such a conclusion. Even if we adopt a purposive construction of the regulations, we do not find it possible to hold that the wearer of a colostomy bag has voluntary

> control over his bowels. It is true that he can prevent "bowel accidents", the uncontrolled escape of faeces, by keeping in place the bag, which acts as a secure receptacle, and emptying it at convenient intervals. But on the ordinary use of language that is not voluntary control of the bowels themselves, which is the way in which [Descriptor] 13(a) is worded. The Commissioner held that the appellant had "no problem with his bowels", which in one sense may be true. In the context of [Descriptor] 13, however, that has to be contrasted with lack of voluntary control over his bowels and must in our view mean that the claimant has normal voluntary control. The appellant patently has not such control.... We accordingly are unable to agree with the conclusion of the Commissioner in the present case that the appellant has "no problem with his bowels"."

28. Before us, Mr Kenny for the Secretary of State submitted that these comments were not binding upon this Tribunal of Commissioners because they were made by a Northern Ireland Court, and were merely *obiter dicta*.

29. Decisions of the Northern Ireland Courts do not constitute binding authority upon the Courts of England and Wales, the Courts of Scotland or British tribunals. However, as expressed in Tribunal of Commissioners' decision R(SB) 1/90, it is incumbent upon a Tribunal of Commissioners (and therefore also upon any single Commissioner or an appeal tribunal) to follow a decision of the Court of Appeal in Northern Ireland. The decision in R(SB) 1/90, after full argument including the assistance of an *amicus curiae*, set out clearly and comprehensively the justification and necessity for this approach. We commend and approve it. It concluded (in Paragraph 15);

> "Although the social security legislation governing Northern Ireland is not contained in the same Act as applies to Great Britain.... we nevertheless consider that, where the relevant provisions are identical (as they are in this case), the same judicial approach should equally be adopted..... It would be naturally expected that, wherever the statutory provisions operative both in Northern Ireland and Great Britain are identical, such provision should be interpreted uniformly.... Accordingly, in our judgment, it is incumbent upon us, particularly as the decision of the Court of Appeal in Ireland was unanimous... to follow that decision...."

30. R(SB) 1/90 was specifically concerned with the correct approach of Commissioners to the *ratio decidendi* of the judgments of the Northern Ireland superior courts, i.e. statements of law from those courts based upon the facts as found. The extent to which *obiter dicta* of those courts should be followed depends upon the circumstances in which the judicial comment was made. Where such comments are made without full argument, and, having heard full argument, Commissioners consider the view expressed to be erroneous, then it is open to them to depart from the statement of law expressed. However, where, as in this case, the Lord Chief Justice of Northern Ireland expresses the view of a unanimous Court of Appeal, after full argument by Leading Counsel (including Leading Counsel acting as *amicus curiae*), on a regulatory provision identically worded in Northern Ireland as in Great Britain, expressly for the purpose of giving guidance to Commissioners, then it seems to us that such comments are hardly less persuasive upon Commissioners than the *ratio* of a Northern Ireland Court of Appeal decision. Where an appellate court makes it clear that it is giving guidance on a potentially controversial point to prevent further unnecessary adjudications, such *dicta* are of the highest possible persuasive authority. A Commissioner (or a Tribunal of

Commissioners) could only not follow such *dicta* in quite exceptional circumstances, circumstances which are certainly not present in the case before us.

31. We also note that *Perry* was never appealed to the House of Lords and (we were told by Mr Cylok, and accept) it has been the settled practice of decision makers for the Secretary of State to follow that decision since. The Medical Services Incapacity Handbook for Approved Doctors (April 2000 Edition), to which we were referred, reflects this:

> "Pads or appliances (such as a stoma bag) do not provide voluntary control, they merely alleviate the effects of lack of control."

Even if we had considered not following *Perry*, these factors would have further inclined us against doing so.

32. For these reasons, whatever our view of the merits of *Perry*, we would have considered it incumbent upon us to follow it insofar as it expressed the statement of law that a person wearing a colostomy bag had, "No voluntary control over bowels", and therefore satisfied the PCA (and was entitled to incapacity benefit) on that descriptor alone. The position of a person who wears an ileostomy bag is identical. Just as it would be incumbent upon us as Commissioners to follow that statement of law, so was it incumbent upon the appeal tribunal to do so. In failing to do so, the tribunal erred in law and its decision must be set aside. That is sufficient to deal with this appeal.

Activity 13

33. However, even if we were not constrained by the precedential weight of *Perry*, we would find that a person wearing an ileostomy bag falls within Descriptor 13(a) in any event, for the reasons expressed by Carswell LCJ in that case.

34. Individual descriptors in the Schedule to the 1995 Regulations cannot be considered in isolation. They can only be construed in their proper context. For example, Descriptor 13(a) must be read as a description of impairment of continence, i.e. the activity to which it relates. We do not accept Mr Kenny's submission that "continence" relates to whether a person is able, by his actions, simply to contain his emissions of urine and excrement. That definition is too broad. The relevant definition in Blakiston's Gould Medical Dictionary (Fourth Edition) is:

> "The proper functioning of any sphincter or other structure of the gastro intestinal tract so as to prevent regurgitation or premature emptying".

35. Descriptor 13(a) is "No voluntary control over bowels". As indicated above (Paragraph 10), the term "bowel" is usually used to describe the alimentary canal from the stomach to the anus. Mr Keeny indicated that there was a medical debate as to whether the term should properly be used to include the anal sphincter. However, this tract works by peristaltic reflex action, and the only voluntary control a person in normal health exercises over it derives from muscular control exerted by the anal sphincter. In this specific context, the reference to "voluntary control" can therefore only refer to control of the urge to expel waste from the body by the anal sphincter muscle. This is consistent with the definition of "Continence" within the activity title (Paragraph 34 above).

36. An ileostomy bag plays no part whatsoever in assisting a person's control over the one part of bowel activity in which a healthy person can actively participate, *viz* the urge to expel waste from the body. Such a bag does not make a person continent. As the Medical Services Handbook indicates (see Paragraph 31 above), what it does is to mitigate the consequences of incontinence by, in common terms, preventing a mess occurring. An incontinence pad performs the same function. As their name suggests, incontinence pads do not render a person continent but, again, simply mitigate the results of incontinence. Therefore, in our judgment, neither ileostomy nor colostomy bags, nor incontinence pads, affect a person's capacity to perform the activity in issue, i.e. continence. This can be compared with, say, a pair of spectacles which is an external aid which does affect the wearer's ability to perform the activity in issue, in that case vision.

37. For these reasons, in our judgment, a person wearing an ileostomy or colostomy bag has "No voluntary control over bowels" and therefore falls within Descriptor 13(a). As this attracts 15 points under the PCA, such a person satisfies the PCA (and is therefore entitled to incapacity benefit) on the basis of the points under this descriptor alone.

38. Previous individual Commissioners' decisions upon this issue are consistent with our conclusion (e.g. C11/96(IB) (colostomy bag), CSIB/74/1996 (incontinence pads)). Mr Kenny was unable to cite to us any authority to the contrary.

39. However, we should briefly refer to one further case, namely CIB/14210/1996. In that case, the claimant had had his bladder removed and had a urostomy bag. In these circumstances, Mr Deputy Commissioner Jacobs (as he then was) held that the claimant could not be said to have no control over the bladder (Descriptor 13(b)) because one could not have control over that which had been entirely removed. Similarly, he could not be said to lose control of his bladder (Descriptors 13(f) and (g)) because that presupposed there may be at times control, and that cannot apply where there is no bladder to control. He was therefore driven to categorise the case as "No problem with continence", in the sense of "No problem as defined in the earlier descriptors with continence".

40. We consider CIB/14210/1996 to have been wrongly decided. Before us, the Secretary of State did not support the reasoning of Mr Jacobs, or a distinction between a case where a claimant had no bladder or bowel, and a case where the claimant had a malfunctioning bladder or bowel. We agree that there can be no rational basis for such a distinction. The activities and descriptors in the Schedule to the 1995 Regulations need to be given a purposive construction, bearing in mind that the PCA is an assessment of functionality. For example, if a claimant has only one arm, and that arm is paralysed, then he would still fall within the descriptor "Cannot raise either arm to his head as if to put on a coat or jacket" (Descriptor 8(b)), although the claimant himself would more likely say, for example, "I cannot reach my head with my only arm". That is because the descriptor relates to "Reaching" and, as a matter of functionality, he cannot reach his head with an arm. Similarly, the claimant in CIB/14210/1996 could not restrain or advance the process of urination at will and, in a functional sense, he was as incontinent as a person with a malfunctioning bladder that had been by-passed so that his urine passed into a bag. Mr Jacobs described the submission to him, that a claimant who has no bladder can have no control over it, as "an attractive argument". For the reasons we have given, we consider it to have been not only attractive but also correct.

41. We appreciate (as much as the Northern Ireland Court of Appeal appreciated in *Perry*) that, on the basis of this conclusion, a person using an ileostomy or colostomy bag will be entitled to incapacity benefit even if his ability to work is substantially intact, perhaps an unlikely intention. However, on the basis of the words used, even adopting a purposive construction, we too have been unable to escape from the conclusion we have reached.

42. Long-term incapacity benefit is dependent upon a claimant satisfying the PCA. Regulation 24 of the 1995 Regulations makes clear that it is simply a person's capacity to perform the relevant activities which governs whether or not the personal capability assessment is satisfied. No doubt this is on the premise that this capacity is generally a reliable surrogate for an ability to perform some form of work. However, the surrogate is not infallible. A person may have no useful vision or no useful hearing, and yet still be able to perform some forms of work. Conversely, even though a claimant's working ability is substantially affected by a particular disability, he will fail the PCA if he does not satisfy enough relevant descriptors. It is inherent in any system that uses surrogates, that such anomolies may occur. However, if it is not intended that the wearers of ileostomy and colostomy bags should not automatically be entitled to incapacity benefit, then this is a matter for Parliament, and not the Commissioners, to address. For the reasons we have given, we are quite satisfied that, on the proper construction of the current regulations, such claimants are entitled to the benefit.

Summary

43. A claimant who by reason of disablement is never able by exertion of the will to bring under control a discharge of faeces or urine from his body satisfies Descriptor 13(a) or (b), irrespective of whether he retains all or part or none of the bowel or bladder, and even if he uses a bag or an incontinence pad or similar aid which operates effectively and efficiently to prevent "accidents".

44. In the case before us, for the reasons we have given, the claimant was entitled to 15 points under Descriptor 13(a). Together with the 3 points awarded under another descriptor, he ought to have attained an aggregate score of 18 points, and consequently satisfied the PCA and have been entitled to continuing incapacity benefit. The decision of the Preston Appeal Tribunal of 14 May 2003 is therefore erroneous in point of law. Accordingly, we set it aside and, using our powers under Section 14(8)(a) of the Social Security Act 1998, make the decision which the tribunal ought to have given, as set out in Paragraph 1 above.

(Signed) **His Honour Judge Gary Hickinbottom**
Chief Commissioner

(Signed) **Mr Commissioner Henty**

(Signed) **Mrs Commissioner Parker**

10 March 2004