(7)

Walking Descriptor — Stopping or Severe Discomfort; Mission for which Records of Proceedings to be kept *34/98

RJCA/SH/AH/6

Commissioner's File: CIB/3013/1997

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. The decision of the Social Security Appeal Tribunal dated 25 February 1997 is erroneous in law. I set that decision aside and direct that the claimant's case be heard again by a differently constituted tribunal.

2. The claimant appeals, with the leave of the chairman and the support of the adjudication officer now concerned, against the tribunal's decision that the claimant is not entitled to incapacity benefit from and including 26 June 1996.

3. The issue before the tribunal was whether or not the claimant satisfied the All Work Test prescribed by regulations 6(1)(b) and 24 of the Social Security (Incapacity for Work) (General) Regulations 1995 as read with the Schedule to those Regulations. The tribunal's findings in fact are recorded as:-

> "The tribunal accept as correct and adopt the facts set out in box 5 of the appeal papers under the heading "summary of facts". The tribunal find that the appellant should have been awarded 7 points for being unable to walk more than 200 metres, 3 points for being unable to walk up a flight of stairs without having to hold on, and 3 points for sometimes being unable to bend or kneel as if to pick up a piece of paper from the floor. The net award of points should, therefore, have been 10. The appellant did not, therefore, satisfy the All Work Test.".

4. The tribunal's reasons for its decision are recorded as being:-

> "The 3 descriptors suggested by the appellant's representative were walking, bending and kneeling and stairs. The tribunal accepted that the appellant did have limitation in walking, and accepted his evidence on this and that of his general practitioner; the exact extent of the appellant's ability to walk was a little uncertain, but the general practitioner had mentioned 200 yards, as had the appellant, and the tribunal, therefore, feel that this is probably accurate. It is possible that the appellant could walk somewhat further than this in that he did say in evidence that he walked to the local park and went around there for exercise, as he had been advised to do, and that if he did this at a slow pace this tended to delay the onset of muscle pain. Taking a broad view of the evidence, however, the tribunal find that 200 metres is a reasonable estimate of the appellant's walking ability. So far as the other descriptors are concerned the tribunal accepted the appellant's evidence to the effect that sometimes he would have difficulty in bending or kneeling and that he did require to hold on when going up a flight of stairs. However, even with these points the appellant still did not satisfy the All Work Test.".

5. The claimant's reason for appealing the tribunal's decision is that he considers that the tribunal has not dealt properly with the question of the number of points which he scores per the schedule to the regulations in respect of the activity of walking. There is no suggestion that the claimant cannot walk but paragraph 1 of the schedule includes the following two descriptors:-

> "(c) Cannot walk more than 50 metres without stopping or severe discomfort.".

and

> "(d) Cannot walk more than 200 metres without stopping or severe discomfort.".

Descriptor (c) carries 15 points and descriptor (d) carries 7 points. The claimant argues that the tribunal, in finding that he scored 7 points because it considered that he is able to walk 200 metres, had neglected to deal with the relevant question which is how far he can walk without stopping or (the claimant's and my underlining) severe discomfort.

6. I accept the claimant's argument that to demonstrate that it has applied the descriptors (c) and (d) properly a tribunal must make it clear that it has considered not only the point

in distance at which the claimant stops walking because of severe discomfort but also the point at which the onset of severe discomfort occurs. No doubt some claimant's will stop walking at the first point at which severe discomfort is experienced but others will keep going until forced to stop. It is easy for a busy tribunal to overlook the distinction when considering evidence but, nevertheless, for the proper application of paragraph 1 of the schedule it must be observed. The tribunal's failure to apply the Schedule properly is an error in law on account of which I have set its decision aside. In coming to that conclusion I am disagreeing with the adjudication officer now concerned who has submitted that the tribunal has made relevant findings in fact and given sufficient reasons for its conclusions as to the claimant's score on the All Work Test.

7. When I first saw the appeal file the only copy of the chairman's record of proceedings was in manuscript. The notes of evidence were probably going to be relevant to my decision as the claimant had mentioned in his statement of grounds of appeal the evidence which he had given to the tribunal. I was unable to decipher the record of proceedings and, indeed, thought that it had been written in shorthand. I directed that the chairman should supply a typewritten transcript. He has done so and I am very much obliged to him. It would be surprisingly unhelpful for a chairman to leave his notes in shorthand, which of course is not normally decipherable by anybody other than the writer, and, therefore, I must make it clear that in this case the chairman did not do that. With the help of the transcript I am able to decipher his handwriting. However, without the chairman's transcription the record of proceedings is illegible. I say that in the full knowledge that my own handwriting is not a matter for congratulation and that impeccable manuscript cannot be expected in the circumstances of a tribunal hearing.

8. I directed the adjudication officer to include in his submission on the appeal his views as to whether or not the manuscript record of proceedings in this case complies with the requirements of regulation 23(4) of the Social Security (Adjudication) Regulations 1995. Regulation 23(4) provides as follows:-

> "A record of the proceedings at the hearing shall be made by the chairman in such medium as he may direct and preserved by the clerk to the tribunal for 18 months, and a copy of such record shall be supplied to the parties if requested by any of them within that period".

9. In response to my direction the adjudication officer has submitted that on the face of it regulation 23(4) would appear to sanction the record of the proceedings being made in shorthand if that is the chairman's preferred medium but that the rules of natural justice demand that when the record is

issued to a party who has requested it it must be accompanied by a transcript where that is required to render it comprehensible.

10. I take a more literal approach to the matter. Regulation 23(4) refers to "such medium" as the chairman may direct. A medium is a means of communication. For the purposes of 23(4) it is a means of communication between the tribunal and anyone who has a legitimate interest in knowing what procedures the tribunal followed and what evidence it heard is arriving at its decision. If the medium adopted by the chairman is, for whatever reason including illegible handwriting, incomprehensible without his or some other person's assistance the requirements of regulation 23(4) have not been met and as a result the tribunal's decision is erroneous in law.

11. As I have to set the tribunal's decision aside on account of the matter discussed in paragraph 4 above I need not specify the illegible record of proceedings as a further reason for setting aside, especially as the claimant has not made any complaint in that respect: but had the claimant or anyone else requiring to read the record of proceedings complained that he could not obtain a comprehensible record that would have been a ground for setting aside which I could not have ignored. Whatever medium is employed by the chairman should, to comply with regulation 23(4), be one which is readily comprehensible to others. There is also the practical consideration that a medium which is not comprehensible to the parties without the assistance of the chairman may be rendered useless if some mishap befalls the chairman after he has made it. In those circumstances it would be impossible to cure the breach of regulation 23(4) by the subsequent production of a decipherable record authenticated by the chairman.

12. For completeness, I should say that the medium in which the chairman states the tribunal's findings in fact and reasons for decision must to comply with regulation 23(3A)(b) and (3B) be comprehensible to others without his assistance.

13. For the foregoing reasons the claimant's appeal succeeds and my decision and direction are in paragraph 1 above.

(Signed) R J C Angus
Commissioner

(Date) 21 April 1998