SOCIAL SECURITY AND CHILD SUPPORT COMMISSIONERS

Commissioner's File No.: CIB/4406/00

Starred Decision No: 62/01

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Mr Damien Abbott,
Office of the Social Security and Child Support Commissioners,
5th Floor, Newspaper House, 8-16 Great New Street, London EC4A 3BN.

so as to arrive by 10th August 2001

Comments on Northern Ireland Commissioners' decisions will be forwarded to the Northern Ireland Chief Commissioner.

1. This appeal, brought with my leave, succeeds The decision of the Appeal Tribunal on 13 6 00 was erroneous in point of law, as explained below. I therefore set it aside and remit the appeal to a completely differently-constituted tribunal for rehearing, in accordance with the directions given below..

2. I directed an oral hearing because I felt that this case, as presented, raised a legal point worth further consideration: what was to be done about a claimant who although, except when having an allergy attack, had no or few physical difficulties which would score points on the All Work Test, nonetheless claimed that this was because she carefully monitored the environments into which she ventured, something she would be unable to do if required to return to work. The appellant, who did not attend (I had said she need not do so unless she wished), was represented by Mr Kurt Kleinschmidt of Tameside MBC Welfare Rights. Miss Rachel Rayner of the DSS Solicitor's Office represented the Secretary of State. I should like to compliment both representatives, both on their prepared submissions and on their readiness to discuss the issues raised.

3. The appellant was born on 29 6 65. She became incapable of work on 7 11 97 with severe allergy. She passed an All Work Test following an examination on 25 9 98, on which allergy to scents, asthma, sinusitis and reactive depression were found. She scored only 6 points on physical descriptors (mildly limited walking and standing because of light-headedness), but (by my calculation) 11 points on the mental descriptors. She described having to give up work because of an adverse reaction to perfume (a colleague's, according to her representative at the oral hearing). She did nothing to help her mother in the house because she could not tolerate the scents in detergents, air fresheners or soap (she used non-scented soap to wash herself and her hair) and she felt light-headed all the time so could not cook, iron or vacuum. She seldom went out because petrol fumes could set her off. The doctor recommended retesting in a year, as she was having further investigations.

4. She was sent an All Work Test questionnaire in late 1999. She said she still suffered, as a result of extreme scent and perfume sensitivity, from

asthma, chest pains, nausea, headaches, dizziness, sore throats, ear pains and extreme sinus pains, triggered by exposure to even low doses of irritants. She said she had difficulties with all of the physical descriptors except continence when she was having an attack. She was depressed by her condition and had missed many family occasions because of her fear of exposure to irritants. Her GP, however, told the Benefits Agency on 24 12 99 that she was much improved clinically and now very rarely got allergic reactions. She had improved gradually and it was hoped she would benefit by proposed surgery.

5. She underwent a further All Work Test examination on 12 1 00. The doctor recorded her as saying the results of a CT scan had been normal and allergy tests had shown she had seasonal rhinitis. Her statement as recorded was that she suffered from headaches and sneezed a lot when she had an attack. Her asthma spray helped, and she had had to use it 6/7 times in the last 8 weeks. She had had a bad attack affecting her nose and eyes the previous month. She got fed up being at home and unable to return to work and could not always visit places because of getting an attack. She tried to avoid going to places where there was a small of perfume, and avoided buses for the same reason. She went to shops when it was less crowded so as not to come into contact with people or perfume. She went out socialising, but avoided places where she might be subjected to allergy triggers and get an asthma attack. She enjoyed work at home, carried out housework and cooking and kept her home and her bedroom dust-free. She had no physical weakness unless she had an attack. The doctor found no physical descriptors were fulfilled except during an attack, which might last for half-an-hour to an hour, and further found that this time no mental descriptors applied either. He observed that she was not clinically depressed but worried about her allergy and tried to avoid triggering it.

6. Since the appellant had failed a fresh All Work Test, the decision-maker superseded the award under regulation 6(2)(g) of the Decisions and Appeals Regulations and found her no longer incapable of work from and including 19 1 00

7. The appellant objected that she had passed the previous All Work Test (not a matter that was relevant to the decision-maker, but which could have been relevant to a tribunal), and said she still had the same reactions to

perfumes, scents and irritants, and if she had better control of her illness it was only because she had learned more about how to avoid triggers. Medication had been of only short-term assistance. She was now awaiting an operation on her nose. She complained that the latest All WorkTest was much less thorough than the earlier one. But I observe that she passed the earlier one only on the basis of mental descriptors fulfilled because of her depression; the earlier doctor, however understanding of her condition he may have been, did not find enough physical descriptors to enable her to pass on these alone. And, like her GP's report, the appellant's own statement as recorded on the later test did indicate an improvement, at least so far as housework was concerned.

8. The appellant said she now did voluntary work in a charity shop for 3 hours 1 day a week. She did not go near the clothes but could work, sorting out toys, in a room where she did not have to come into contact with customers. Even with these precautions she could still end up very unwell on the day she went in or the next, so that she would have to spend time in bed to recover.

9. The appellant's GP wrote a letter dated 31 3 00 listing her medication and her conditions, which now again (since failing the All Work Test) included depression re-diagnosed on 4 2 00. This in itself should have made no difference to the tribunal's decision, since it was a circumstance which did not obtain at the date of the decision, 19 1 00 (s12(8)(b) of the 1998 Act). The appellant had had her operation on 22 2 00 (well within 3 months of the date of the All Work Test examination), but her doctor did not know the details of the operation performed. The doctor had no reason to believe the appellant's symptoms had significantly changed since her 1997 diagnosis, and their effect on her life had resulted in anxiety and depression for which she was now (ie again) being treated.

10. I observe in passing that this letter, if and in so far as it represents a different opinion from the report to the Benefits Agency dated 24 12 99, highlights a perennial problem faced by all tribunals dealing with incapacity or disability. A doctor completes an official questionnaire, "cold", in which he or she expresses a clear opinion, doubtless warranted by the practice notes, which is adverse to a claimant. This view is quite properly taken into account in making an adverse decision. In the course of the appeal the

doctor, at the prompting of the appellant or representative, expresses a more favourable opinion. Has the doctor been to some extent pressured by the appellant, with whom there is an ongoing doctor/patient relationship? Or has the appellant simply reported matters with which he or she does not normally trouble the doctor, because they are not unexpected in the context of the illness, or the appellant's view of it?

11. The tribunal had both All Work Test reports, Mr Kleinschmidt having obtained the earlier one. It was also supplied with a copy of CIB/14587/96 in which Mr Commissioner Rice said that the All Work Test was not to be applied with a working environment in mind, but only in the context of everyday life at home. He observed that if a working environment were to be considered, what should it be? These questions wereside-stepped by the Test, which likewise made no reference to the saleability of an appellant's skills to an employer.

12. The appellant gave oral evidence that at the time of the latest Test she was having asthma attacks about twice a week. She said she did not have a list of what triggers set her off. She disputed some of the examining doctor's findings on the mental health test, and also his account of her statement about her daily activities and what she had said about the CT scan findings.

13. The tribunal accepted Mr Kleinschmidt's submission that it was the appellant's ability to function in an everyday, not a workplace, environment that it had to consider, and it also seems to have accepted a submission that the appellant had still had mental health problems at the date of the Test, because it carried out a mental health test. And it also found that while the appellant was having an attack, she would satisfy the All Work Test. But it accepted her GP's statement in December that clinically she was much improved and very rarely got severe reactions, and decided that this constituted a change of circumstances.

14. The tribunal accepted that the appellant avoided going out, but decided that this was to avoid encountering allergy triggers, rather than because of her depression. I observe that the same might be said of her anxiety that work would worsen her illness and that sleep problems interfered with her daily activities. This merely points up the difficulty in which a person with the appellant's claimed condition can find herself under

the current regulations, which rigidly separate physical from mental disorders.

The appeal to me

15. The appeal complained that the tribunal had disregarded the later GP's letter which attested to the underlying symptoms remaining the same, and further submitted that the tribunal had paid inadequate attention to the risks this appellant ran even in what to other people would be "normal" environments. CSIB/12/96 had drawn attention to the need to consider the risks to health which might be involved in performing certain activities (in that case the appellant had been advised by her physiotherapist not to bend over to pick things up but to bend her knees and crouch, and not to lift anything heavy). CIB/14722/96(T) warranted equating dizziness and nausea with pain.

16. In granting leave to appeal, I asked for a submission on the normal environment point. The Secretary of State's officer did not support the appeal. He argued that the appellant could reasonably be expected to take precautions to avoid exacerbating her condition (he did not explain how she might do this in a working environment). He conceded that CIB/243/98 had accepted that a claimant "cannot" perform a descriptor if he will not do so because of a real fear of the consequences to his health, but the genuineness of such a fear would have to be assessed on both the credibility of the claimant's account and its consistency with the medical evidence.

17. Mr Kleinschmidt agreed that the question was whether it was reasonable for the appellant to limit her exposure to potentially triggering environments, and whether on the facts of this case there might be no "normal" environment (ie one not adapted to her particular condition) which would not make her ill.

The oral hearing

18. At the hearing Mr Kleinschmidt fortified his written submissions by reference to CI/95(IB) where the Commissioner had invoked a comparison of a claimant with a normal fit person (a comparison supported by the WHO definition of disability) in assessing whether, overall, that claimant was

incapable of doing something not only most of the time but *in most circumstances* (Mr Kleinschmidt's emphasis). This expression brought into consideration the circumstances in which an activity was to be performed, not merely how often or how regularly. Examining doctors ran a particular risk in cases like these of obtaining only a snapshot view of *symptoms*, not of overall disability. It was necessary (see page 574 of the 2000 edition of *Bonner*) to consider the history and evolution of the medical condition, the effect it has on daily life and normal tasks over a period of time, and the limitations it places on a claimant. Decision makers, Mr Kleinschmidt said, should envisage the circumstances in which a healthy person would be performing the descriptors, and compare these with the limitations enjoined by her condition on a particular claimant and the normal sensible precautions she would have to take to avoid allergy triggers. This approach might only affect a small number of people (if you have a bad back then I suppose it does not make much difference where you perform the bending descriptor; if you are allergic to industrial chemicals, you will not come across them much in ordinary life), but for a claimant in this appellant's position, it was significant.

19. Regard should also be had to the points listed under A(i)-(v) at page 593 of *Bonner*, particularly the effects of pain and discomfort (with which CIB/14722/96(T) equates dizziness and nausea), a claimant's fear of, or medical advice to refrain from, doing particular activities, and variable or intermittent conditions.

20. Mr Kleinschmidt told me that the appellant avoids supermarket aisles where she is likely to encounter scents, such as washing powder displays, and that she uses a special detergent. Her operation had not greatly helped her. She has since the decision under appeal passed another All Work Test.

21. Miss Rayner submitted that the tribunal had not erred in law, and indeed in the light of the evidence it was difficult to see how it could have reached any other conclusion. It was not clear there was any real conflict between the GP's 24 12 99 report and his later letter, which was before the tribunal. At least to some extent, the latter reported post-decision developments. The tribunal had taken into account the intermittency of the appellant's condition as she had described it.

22. She agreed, as I understand it, with Mr Kleinschmidt that the All Work Test activities had to be considered as performed in a normal everyday environment not adapted to a particular claimant's condition; if special precautions had to be taken in such an environment, these might be taken into account in assessing performance, as a matter of fact and evidence. But I should be cautious about transposing authorities which refer to individual All Work Test *activities* (in terms of eg pain or dizziness, fear of doing particular activities or medical advice to refrain from doing them) into the different context of the environment in which they are to be performed and any fears which may arise from exposure to that environment. The Northern Ireland Chief Commissioner in his C1/95(IB) reference to performing activities "in most circumstances" (his paragraph 7) should not be taken as introducing any consideration other than performing "the everyday activities specified in the descriptors" in a non-working situation (also paragraph 7).

23. Mr Kleinschmidt in reply reiterated that the All Work Test contemplated a normal everyday environment, but having regard to any sensible precautions which might be required of a particular claimant. Mr Commissioner Rice in CIB/14587/96 referred to evaluating the tests "from the standpoint of general everyday living"; this must imply a set of circumstances that would not be a problem for most people (that appellant had a bad back), but did not rule out consideration of the particular needs of a particular claimant in such everyday circumstances.

The legislation

24. The All Work Test (now renamed the personal capability assessment) was at the dates relevant to this appeal, under regulation 24 of the Incapacity for Work (General) Regulations, "a test of the extent of a person's incapacity, by reason of some specific disease or bodily or mental disablement, to perform the activities prescribed in the Schedule". The general heading of the Schedule was "Disabilities which may make a person incapable of work", and it set out 14 physical and 4 mental "activities", each consisting of a number of "descriptors" scoring prescribed points. 15 points were needed to "pass" the test on physical, or a combination of physical and mental, activities, 10 points to pass on mental activities alone. From 6 1 97 regulation 25(3) required that physical incapacities must arise from a specific bodily disease or disablement, mental incapacities from a specific mental

illness or disablement. It will not escape notice that the emphasis is throughout on the activities rather than the circumstances in which they are to be performed.

25. Regulation 27 ("Exceptional circumstances") prescribed certain circumstances in which a person who did not satisfy the All Work Test should nonetheless be treated as incapable of work. This regulation originally included as paragraph (b) that a person be suffering from some specific disease or bodily or mental disablement by reason of which there would be a substantial risk to the mental or physical health of any person if he were found capable of work. That "exceptional circumstance" might have covered the present appellant; but it was abolished from 6 1 97, and therefore she cannot invoke it.

The authorities

26. The authorities concur that despite indications in the guidance for examining doctors, the Test was not to be considered in any specific working environment. This seems to have been because of the inconvenience caused by having to envisage a specific working environment, as under the old invalidity benefit system; but neither party disputed the conclusion.

27. Going through the remaining four points at page 593 of the latest *Bonner*, I have no difficulty in accepting that, to paraphrase the authorities there set out, the effects of pain or fatigue or dizziness or nausea on the performance of the All Work Test activities must be taken into account. So must the effect of a claimant's fear of performing them, though I think a tribunal is entitled to require fairly stringent proof of what it is a claimant fears and that this fear is reasonably-founded. If it is not, we may be in the realm of mental health. Medical or other therapeutic advice not to do certain things such as lifting must be considered, though again I think something more than a claimant's unsupported assertion would be desirable. Variable or intermittent conditions require an overall view to be taken, unless there are reasonably clearly definable periods of illness and remission -eg where a claimant has regular steroid injections which help for part of the time in between but wear off before the next one is due. Activities must be capable of being performed with reasonable regularity - "most of the time" and "normally" are expressions that have been used, and the activity must be

capable of repetition within a reasonable time. CIB/14587/96 suggested that the Test would not be satisfied if a person, having once done something, could not repeat it for hours or days thereafter. I would agree with this, as it takes into account the fact that in ordinary life one does not repeatedly walk up and down the stairs or write shopping lists or lift and carry bags of potatoes or hang out the washing. (But common sense must always prevail, and lifting a kettle to fill it and then again to pour from it, or taking a carton of milk from the refrigerator and replacing it will in the nature of things require repetition within a short space of time.)

28. But most of these authorities, not surprisingly, refer to and concentrate on *activities*, as Miss Rayner pointed out, and not on the environment in which those activities are to be performed. CIB/4381/99 held that the All Work Test depends wholly on the fulfilment or otherwise of the prescribed descriptors, and that a person who had lost the sight in one eye and was afraid that working would risk losing it in the other could not, even if there had been medical evidence supporting such risk, pass the Test so long as he still had unimpaired vision in one eye. It could be argued that since the present appellant said she was having fewer attacks than previously because she had learnt what environments to avoid, her correct course of action was to make herself available for work but insist on a jobseeker's agreement tailored to ensure that she was not exposed to the trigger factors she had identified - eg a no-smoking workplace and one where she would not be exposed to chemicals or anything else which might place her at risk. She would then have to take her chance with jobseekers allowance, and if she became ill again, reapply for benefit on grounds of incapacity. One cannot overlook that the original regulation 27(b) was doubtless revoked because it was considered that decision makers were applying it too generously.

My conclusions

29. However, I narrowly persuade myself that the logic of Miss Rayner's acceptance (as I understand it and I hope I have not traduced her) of the permissibility of postulating a normal everyday environment not adapted to a particular claimant but then looking at what reasonable precautions a particular claimant would have to take in such an environment leads to the conclusion that, *subject always to satisfactory evidence*, the type of condition the present appellant claims would be capable in principle of satisfying the

All Work Test. I think this situation can be distinguished from CIB/4381/99, where the claimant's sight would have been no more at risk in a working environment than in any other. I stress that this is the type of situation where convincing and specific medical evidence would be required, in addition to what a claimant says, and that such evidence should be produced at the outset. If a fear of triggering allergies is asserted, medical evidence should support its reasonableness.

30. I am further influenced by the difficulty, in a case such as this, of drafting a jobseeker's agreement which could work. It is one thing to exclude jobs involving exposure to industrial chemicals, or even to require a no-smoking environment, since such are becoming more common. To insist on a workplace where no-one is allowed to wear perfume would not be practicably enforceable under current conditions. This is another point of distinction from CIB/4381/99, where a jobseekers agreement could have excluded employments bringing any additional risk of sight loss.

31. I draw support from CIB/243/98, rather than from the Northern Ireland Chief Commissioner's passing reference to "most circumstances". Though that is capable of lending support, I am reluctant to construe my colleagues' decisions as if they were statutes. But in CIB/243/98, the claimant suffered from asthma, and from fear of triggering attacks at certain times, particularly in winter. The deputy Commissioner remitted the case for a tribunal to make further investigations, and reminded it of regulation 15 of the Incapacity for work (General) Regulations which provides that a person who at the commencement of a day is, or thereafter becomes, incapable of work shall be treated as incapable throughout that day. If it can be shown to be more probable than not that a claimant will become incapable in the course of a day if she is in an unsuitable environment, then this can be taken into account (see also CIB/6244/97, which should be added to the papers).

32. I am even more narrowly persuaded that because I have adumbrated what may be a fresh point of law, the tribunal erred in not considering it, and so I set its decision aside.

Directions

33. I appreciate that my decision on a point of law but with the case remitted for rehearing is the kind that tribunals do not welcome. They wonder why the Commissioner could not have made the decision herself. The reason why I have not is partly the vagaries of a point of law jurisdiction, partly my own responsibility in dispensing the appellant from attending the oral hearing unless she wanted to, but mainly because I am not satisfied that the medical evidence as it stands is adequate to allow a conclusion to be reached.

34. I am not convinced that there was a genuine conflict between the GP's earlier and later evidence, and I do not criticise the previous tribunal for relying on the 24 12 99 report. The later letter said the underlying symptoms were the same, which no doubt they were, but relied heavily on the anxiety/depression re-diagnosed *after* the decision appealed against. This may be an example of the often-encountered problem of the claimant who says "I was feeling a lot better mentally, but then you lot found me capable of work and I have gone right down again". When it was possible to carry decisions down to the date of the hearing, this phenomenon could be dealt with, if necessary, by a staged award. If someone is medically depressed, then it does not matter, it seems to me, what caused it. Buts12(8)(b) of the 1998 Act precludes consideration of this, as a circumstance not obtaining at the date of the decision appealed against.

35. The earlier successful All Work Test does not help, since it was effectively passed on mental health descriptors; and if the later one was also so passed, nor does that, though it would no doubt be helpful to the rehearing tribunal to see it. The appellant would, if the rehearing tribunal agrees that during attacks she satisfied the All Work Test (it does not have to do so), be entitled to 6 points for the "sometimes" physical descriptors, but this alone will not be enough.

36. The tribunal will naturally listen to whatever the appellant has to say about the All Work Test under consideration and any criticisms she may have of the examining doctor's recording of what she said, though of course having regard to its view of the likelihood or otherwise of the doctor's having invented some or all of these statements.

37. It is not entirely clear from the evidence that the appellant's asthma is caused only by trigger factors. Her evidence on this was a little inconsistent, and she was still, by her own account, having two attacks a week even though she was supposed to have learnt what to avoid. She said her charity work caused her problems, despite its relative isolation and limited extent, which might either support her satisfying the All Work Test without specific reference to allergies, or support the particular point of law made in this decision.

38. Since the operation on the appellant's nose did take place within 3 months of the relevant BAMS examination on 12 1 00, and was mentioned in the IB50 (page 8), attention needs to be paid to what the operation was and whether it could be characterised as a major surgical operation or other major therapeutic procedure within regulation 27(c), which would provide an independent ground for allowing the appeal.

39. The appellant would be wise to obtain a report from her consultant dealing with these matters, particularly since she is recorded (and it may of course be wrongly) as telling the BAMS doctor that tests had shown she had seasonal rhinitis.

40. The rehearing tribunal will make its own investigations and its own findings of fact, bearing the above indications in mind..

(signed) Christine Fellner
Commissioner

25 April 2001