

DECISION OF THE COMMISSIONER

1. This is an appeal by the Claimant, brought with my leave, against a decision of the Portsmouth Appeal Tribunal made on 8 June 2001. For the reasons set out below that decision was in my judgment erroneous in law. I allow the appeal, set aside the Tribunal's decision and remit the matter for redetermination by a differently constituted appeal tribunal in accordance with the direction given below.
2. The Tribunal's decision was to dismiss the Claimant's appeal against a decision, made on 13 February 2001, that the Claimant was not from that date entitled to incapacity benefit because he did not satisfy the personal capability assessment. The Tribunal decided that he scored 13 points from the physical activities comprised in that assessment.
3. The Claimant is a man now aged 40 who suffers from low back pain and sciatica owing to disc problems. He had been in receipt of invalidity benefit from 1992. The decision under appeal was therefore one on supersession of a previous award, rather than by way of rejection of an initial claim. It does not appear clearly from the papers whether he had previously been subject to the all work test, although I assume that he had. Indeed, he is recorded as saying to the Tribunal that this was the third time that he had had to go to a tribunal to get his benefits restored. He told the Tribunal (as he confirms in his grounds for this appeal at p.67) that he felt that his situation was improving. In those circumstances, I do not think that the Tribunal needed to see the evidence relating to previous decisions in order to decide the matter properly.
4. In granting leave to appeal I indicated that two of the Claimant's grounds of appeal appeared to be arguable. One of those related to the activity of lifting and carrying, where the Tribunal's reasons were as follows:

"The Appellant stated in his claim form that he could not pour from a 1.7 litre bottle with either hand, but he told the Tribunal he can lift a 5lb bag of potatoes from supermarket shelf to trolley. He does, of course, drive a manual car. Dr. Shalom found "full function" of upper limbs. The Tribunal concludes the Appellant has no problem lifting/carrying."
5. In granting leave to appeal I referred to CIB/483/2001, where it was held (this being conceded by the Secretary of State) that the tribunal had applied the wrong test in asking whether the claimant was able to lift 2.5 kilos from table top height and hand it to another person. The Commissioner said:

"It is common ground, and I agree, that the tribunal applied the wrong test, because "carry" connotes a degree of movement from one place to another. Merely handing something to someone is not carrying it."
6. In the present case the Secretary of State likewise accepts that the Tribunal erred in, apparently, taking the view that the Claimant could "carry" a 5 lb bag of potatoes if he could lift it from supermarket shelf to trolley, which could of course be done merely with the use of the arms and upper body and without walking with the bag of potatoes for any distance at all.

7. However, I do not think that the Tribunal was wrong to take that view. Contrary to the view of the Commissioner in CIB/483/2001, I think that it is reasonably clear that "carry" in the descriptors in para. 8 of the Schedule to the Social Security (Incapacity for Work)(General) Regulations 1995 involves merely moving the relevant object by the use of the upper body and arms, no walking being involved. That is because the activity in para. 8 is described as

"Lifting and carrying by the use of the upper body and arms (excluding all other activities specified in Part I of this Schedule)".

8. Until 6 January 1997 the activity was described simply as "lifting and carrying." In my judgment it is clear that the position since that amendment has been that the descriptors in para. 8 which refer to the claimant's ability to "pick up and carry" an object do not require him to be able to do more than move the object by means of his upper body and arms, and in particular do not require him to be able to walk with it. The new tribunal must, in so far as it makes any difference, apply that view of the law.

9. The second of the Claimant's grounds of appeal which I considered to be arguable related to the activity of standing. The Claimant's contention was that he could not stand for more than 10 minutes without having to move around (worth 7 points). The Tribunal's reasons were as follows:

"In fact, the Appellant stood, without evidence of discomfort, throughout the hearing, as described above. Dr. Shalom considers the Appellant has no problem standing and the Tribunal agrees, noting particularly Dr. Shalom's comments in Boxes 12 and 13, p.31, and the Appellant's responses in his letter of appeal."

10. At the outset of its reasons the Tribunal had said:

"The Appellant asked if he might kneel rather than sit. Permission was given, but in fact he stood throughout the hearing, the palms of his hands on the table."

11. The hearing is stated in the Decision Notice to have lasted 40 minutes. In his grounds of appeal the Claimant says that he was in fact kneeling on a chair in front of the table, the chair being obscured from the Tribunal's view, "steadying" himself with his hands. The "activity" of standing is described in the Schedule to the 1995 Regulations as "standing without the support of another person or the use of an aid except a walking stick." It is not necessary for me to attempt to resolve the question whether the Claimant was kneeling on a chair. In my judgment the Tribunal erred in attaching the importance it did to the Claimant's ability to stand at the hearing without apparent discomfort, without considering the significance of his palms being "on" the table. The facility of placing both palms on the table could have provided support for the Claimant's back above and beyond the only support (i.e. that of a walking stick) contemplated by the statutory definition. The Tribunal should have indicated that it appreciated that, and that it had taken it into account.

(Signed)

Charles Turnbull
(Commissioner)

(Date)

23 May 2002