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SOCIAL SECURITY AND CHILD SUPPORT COMMISSIONERS

Commissioner's File No.: CIB/5586/99

Starred Decision No: 76/01

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*The practice about official reporting of Commissioners' decisions in **Great Britain** is explained in reported case R(1) 12/75 and a Practice Memorandum issued by the Chief Commissioner on 31 March 1987. The Chief Commissioner selects decisions for reporting after consultation with Commissioners. As noted in the memorandum there is also a general standing invitation to comment on the report-worthiness of any decision, whether or not starred for general circulation. However, a decision will not be selected for reporting if it is known that there is an appeal pending against it. The practice in **Northern Ireland** is similar, decisions being selected for reporting by the Northern Ireland Chief Commissioner.*

Any **comments** by interested organisations or individuals on the suitability of this decision for reporting should be sent to:

*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. I set aside the decision of the Liverpool Appeal Tribunal dated 29 March 1999 and refer the case for rehearing by a different tribunal.

2. This case concerns the application of the all work test to the appellant's claim for incapacity benefit. On the usual questionnaire, the appellant scored himself at 50 points on the physical descriptors. A benefits agency doctor ("the BAMS doctor") prepared a report which scored the appellant 0 points on the physical descriptors and 4 points on the mental descriptors. In reliance on this report an adjudication officer decided that the appellant was no longer entitled to incapacity benefit. He therefore took his case to the appeal tribunal. He was supported by a report from his own GP which referred to multiple symptoms experienced by the appellant: referrals to several specialists; and a suspicion from a neurologist that he may be suffering from fibromyalgia. The GP expressed the opinion that the appellant seemed to be unfit to attend any form of work.

3. The tribunal dismissed the appeal and there is now a further appeal to the Commissioner on the ground that its decision is erroneous in law.

4. In their statement of facts and reasons the tribunal referred to the written evidence in the case; stated that they heard oral evidence from the appellant as recorded in the record of proceedings; and concluded that they preferred the evidence of the BAMS doctor because it was expert, objective and based on a clinical examination of the appellant.

5. The case therefore is typical of many appeals relating to incapacity for work. The tribunal is faced with a conflict between differing medical opinions. It must listen to oral evidence from the appellant before making up its own mind about which view of the appellant's disabilities is more likely to be correct.

6. However, I do not find in the record of proceedings any indication that full oral evidence was received from the appellant. There are a number of references by the appellant's representative to Commissioner's decisions and medical reports. The only entry which might possibly relate to the appellant reads as follows:-

"Appellant has been using a tens machine for about 3 months."

7. The tribunal statement tells me that the oral evidence received from the appellant is recorded in the record of proceedings. I conclude therefore that this tribunal did not receive any detailed oral evidence about the physical and mental descriptors which were in issue. There is no suggestion in the papers that the appellant was unwilling to give evidence to the tribunal. In these circumstances I conclude that there was a breach of natural justice. The tribunal should not have preferred the BAMS doctor's evidence, which disputed the appellant's account of his disabilities in his questionnaire, without first listening in some detail to the appellant's oral evidence about the effect of his condition. This was not "fair play in action". The case must be reheard.

8. There is a suggestion in the papers that a new claim may have been made. Before the rehearing, the Secretary of State must make a fresh submission to the tribunal explaining the history of any subsequent claims to benefit by the appellant.

Nicholas Warren

(Signed)

Nicholas Warren
Deputy Commissioner

(Date)

4.4.01