



Lost and altered consciousness – a headache for many

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Abstract

This is the first part of a two-part paper that considers the assessment criteria for incapacity benefit (IB) and employment and support allowance (ESA) and how these benefits apply to claimants who are unable to work because they experience episodes of lost or altered consciousness.

Part one considers how the IB/ESA appraisal system works in practice and looks specifically at the legal interpretation of lost and altered consciousness. Part two, which will be published in a future issue, will give practical guidance to advisers.

Key words

Lost or altered consciousness; incapacity benefit; employment support allowance.

Lost or altered consciousness – an attempt at definition

An episode of lost consciousness means having become completely unconscious, eg. a person who finds him/herself on the ground with no idea how they got there (characteristic of a major motor seizure or, alternatively, syncope), or upright and conscious again but with a missing memory of what they were doing moments before (characteristic of one specific form of epileptic seizure called an absence seizure).

An episode of altered consciousness means, to a doctor, an episode of diminished consciousness. In other words, it is a change in the quantity of consciousness rather than a change in its quality. This medical view seems to

be in contrast with the legal view, as for example demonstrated by Mr Commissioner Walker (*CSIB 14/96*). In contrast to this legal authority, few doctors would see vertigo of any severity as a form of altered consciousness. Similarly, the pain of migraine normally leads to a change in the quality of consciousness, through distraction, rather than to its diminution.

Background to the benefits system

Incapacity benefit

Incapacity benefit (IB) was introduced in 1995 (HM Government, 1995). With effect from 4 October 2008, IB was replaced by employment support allowance (ESA). However, because there

are transitional provisions in place, advisers must be familiar with both schemes. A considerable number of people still receive IB. The government's aim is to phase out IB by 2014. This will include 'transporting' IB recipients on to ESA (Department for Work and Pensions, 2010). In 2010, two pilot schemes were created in Aberdeen and Burnley. The government was satisfied with the progress made and hence made *The Employment and Support Allowance (Transitional Provisions, Housing Benefit and Council Tax Benefit) (Existing Awards) (No. 2) (Amendment) Regulations 2010* (Department for Work and Pensions, 2010).

Until 4 October 2008 those claiming IB were initially subject to the 'own occupation test'. Claimants were required to state their medical difficulties and to provide medical evidence, usually a time-limited GP certificate. The Department for Work and Pensions (DWP) has the power to make enquiries about any particular claim to any of the benefits that it administers at any time through Regulation 7 of *The Social Security (Claims and Payments) Regulations 1987. (SI 1987/1968) (as amended)* (HM Government, 1987).

The DWP can also refer claimants for a more rigorous appraisal, the personal capability assessment (PCA). This invariably involves a medical examination to consider whether claimants are capable of performing various activities, known as the PCA descriptors. Additionally, medical assessors are required to consider whether those with very serious mental or physical problems are exempted altogether.

The physical descriptors in the PCA are grouped into areas of activity that include walking, bending/kneeling, sight, speech and hearing, incontinence and lost or altered consciousness. The mental descriptors are grouped into four categories including completion of tasks and interaction with other people.

In order to pass the PCA and be incapable of work, claimants are required to 'score' 15 points on the physical descriptors or 10 on the mental descriptors. A slightly more complicated equation is specified for those awarded a combination of mental and physical points.

Claimants are not limited to one particular descriptor activity, eg. a diabetic diagnosed with retinopathy or neuropathy and experiencing hypoglycemic attacks could conceivably score in relation to the descriptors dealing with vision, walking and lost/altered consciousness.

Employment support allowance

From 4 October 2008, the ESA assessment regime has been in place (HM Government, 2008). This scheme does not simply distinguish between those who are capable of work and those who are incapable of work. Barring a relatively small number of people who are considered to be severely ill or disabled, it is anticipated that most claimants are capable of some form of work, albeit possibly not in a preferred occupation.

Having applied for ESA and provided medical evidence, ESA claimants enter what is called the initial assessment phase, when the benefit is paid at an initial basic rate. Claimants will then complete an ESA50 form, a self-assessment questionnaire, and attend a work capability assessment (WCA), conducted by a healthcare professional (HCP), eg. doctor or a nurse, who provides a report on the claimant – an ESA85. This process is very similar to the PCA examination process.

At the ESA85 assessment, HCPs will initially consider whether claimants can or cannot undertake one or more of the activities specified in Schedule 2 of the ESA Regulations, which are similar, but not identical, to those described above for IB. Those who score 15 or more points will be classified as having a limited capability for work. Having considered Schedule 2, HCPs will then assess whether a claimant satisfies one or more of the activities specified in Schedule 3 that applies to claimants who are more severely disabled, for example those who cannot walk up to 30 metres. Any claimants qualifying under Schedule 3 will be placed in the support group and will not be expected to undertake any form of work appraisal process. Those with limited capability for work, on the other hand, will at the very least be asked to attend a work-focused interview (WFI) with a Job Centre

adviser to consider their career options. If they do not attend, their ESA entitlement could be stopped.

Case law on lost or altered consciousness

Descriptor 14 as originally drafted

Descriptor 14 of the IB PCA descriptors dealt with the situation where the claimant was suffering or was claiming to suffer from lost or altered consciousness. The heading to the descriptor stated: 'Remaining conscious other than for normal periods of sleep'.

Early commissioners' decisions¹ interpreted this wording very broadly. In *CSIB 14/96*, the claimant suffered from severe and frequent headaches that necessitated him lying down for between 30 minutes and two hours at a time. At such times, he was unable to conduct normal activities but did not lose consciousness. Commissioner Walker declined to lay down specific guidelines as to what constituted altered consciousness. He determined that it was necessary to ascertain how the appellant was affected by pain and stated:

'If an individual is so distracted by the pain that he requires to lie down and otherwise retire from what he is doing then it may be possible to conclude that his consciousness has become altered by the degree of pain and that he is incapable of doing anything effective other than coping with it.'

In the case of *CIB/13739/1996*, the issue was whether altered consciousness could include vertigo and dizziness. It was found that severe attacks of vertigo, where the surroundings suddenly and without warning spin round so that the sufferer loses spatial perception of his environment, and loses control of his balance and falls over, could amount to episodes of altered consciousness. In a similar vein, in *CSIB 44/1997* it was held that lost consciousness could embrace irresistible periods of sleep due to disease or medication.

In these cases, the emphasis is very much on the practical effects of a person's ability to function and undertake day-to-day activities,

rather than a detailed analysis of what lost or altered consciousness actually is.

An attempt at definition of altered consciousness at least was made in the decision *C13/96 (IB)*, in which it was said that a person has an involuntary episode of altered consciousness when:

'... he has reached a state of mental confusion such that he is no longer properly aware of his surroundings or his condition.'

This is necessarily a more restrictive approach than that taken in the cases above. It is fair to say, therefore, that even before amendment there was considerable uncertainty as to how descriptor 14 should be interpreted. Some considered the interpretation of altered consciousness propounded by Commissioner Walker (*CSIB 14/96*) was too wide, preferring a more literal meaning more akin to the medical principles explained previously.

Descriptor 14 as amended

When commenting on the meaning of the original descriptor 14 to the independent Social Security Advisory Committee (SSAC)², the Secretary of State wrote:

'The current wording has led to some confusion for those applying the test, as to whether spells of dizziness or vertigo should be awarded a descriptor... By specifying the type of fit that is applicable, the amendment makes it clear that momentary disturbances of consciousness (such as spells of dizziness, vertigo and giddiness) should not count.' (*R (IB) 2/07*)

This extremely restrictive interpretation led to the amended descriptor 14 (HM Government, 1996) (see *Table 1*, opposite), which is headed:

'Remaining conscious other than for normal periods of sleep without having epileptic or similar seizures during waking moments.'

The descriptor now appeared to apply only to those people who suffered fits similar to epileptic episodes. Notwithstanding

Table 1
Incapacity benefit descriptor 14

Remaining conscious other than for normal periods of sleep without having epileptic or similar seizures during waking moments	14(a) Has an involuntary episode of lost or altered consciousness at least once a day.	15
	(b) ... at least once a week.	15
	(c) ... at least once a month.	15
	(d) ... at least twice in the six months before the day in respect to which it falls to be determined whether he is incapable of work for the purposes of entitlement to any benefit, allowance or advantage.	12
	(e) ... once in the six months before the day in respect to which it falls to be determined whether he is incapable of work for the purposes of entitlement to any benefit, allowance or advantage.	8
	(f) ... once in the three years before the day in respect to which it falls to be determined whether he is incapable of work for the purposes of entitlement to any benefit, allowance or advantage.	0
	(g) Has no problem with consciousness.	0

this, in *CIB/459/2002* and *R (IB) 3/04* Mr Commissioner Jacobs stated that because capacity to work was in issue, rather than diagnosis, it was arguable that the question of whether a seizure was similar to an epileptic episode should be determined by the effect rather than the cause. In other words, if the effect of the particular applicant's condition (for example severe migraine or vertigo) is to cause them to suffer something like an epileptic fit, they should meet the requirements of this descriptor. Commissioner Jacobs' overall approach was however firmly rejected by Mr Commissioner May QC in *CSIB 148/05*.

The uncertainties about the meaning of lost or altered consciousness were resolved by a Tribunal of Commissioners³ in *R (IB) 2/07(T)* (hereafter *2/07*). Any suggestion that conditions such as migraine or vertigo (no matter what the effect of those conditions) fell within the ambit of the amended descriptor 14 was emphatically rejected:

'...the word "seizures" is to be construed as meaning episodes that are involuntary, overwhelming and sudden and the phrase similar seizures is to be construed by reference to the similarity of the effects of the seizures to epileptic seizures.'

As a result, many, if not all, migraine, vertigo and other sufferers are likely to be excluded from the ambit of the amended descriptor 14.

In a recent decision, *CIB1612/09*, Upper Tier Judge Lane considered whether the amended descriptor 14 could apply to stress-induced seizures, which medically speaking were not epileptic. She explained that *2/07* had determined that for a person to experience an episode of altered consciousness it was necessary to establish that *'he was no longer properly aware of his surroundings or his condition, so as to be incapable of any deliberate act'*. She considered that seizures should be defined as *'involuntary, overwhelming and sudden'*. The term similar seizures should be construed by

reference to the similarity of the effects of the seizures to the effects of epileptic seizures.

Judge Lane rejected the contention that for the purposes of the descriptor 14 it should be taken that all seizures should display the presence of abnormal electrical activity in the brain. Noting that the stress-related seizure is a medically recognised condition, Judge Lane focused on the effects of the condition rather than on the issues of diagnosis/definition. She advocates a wide-ranging flexible approach that is not hidebound by a specific reference to epileptic seizures or similar. It is clear from her decision that it is quite possible for those with non-epileptic conditions to meet the requirements of the amended descriptor 14. However, her decision also shows that those who suffer unpleasant, debilitating headaches or bouts of vertigo, yet remain 'properly aware' will continue to be excluded from the ambit of this descriptor.

ESA descriptor 11

The descriptor dealing with lost or altered consciousness under the ESA is set out in *Table 2*. It is expressed to deal with 'Remaining conscious during waking moments'.

The Upper Tier has not yet been asked to rule on the meaning of any aspect of this new descriptor. In the absence of such a decision should the authoritative 2/07 be followed? Alternatively, does the wording of the new descriptor 11, which is clearly similar to the 'old' descriptor 14, entitle the decision-

maker or tribunal to revisit the views of Mr Commissioner Walker? Does the new wording assist the migraine sufferer, who remains aware of his surroundings or condition but at the same time experiences debilitating, possibly prolonged sensations that render it very difficult or impossible for him to function in a reasonable manner?

Some may argue that to adopt the pre-1997 approach to descriptor 11 with its very broad interpretation of lost or altered consciousness would be at odds with the ethos of ESA, which in part was to introduce much stricter criteria for those claiming an inability to work. Alternatively, if those drafting the ESA descriptors considered the 2/07 approach was correct, why draft a piece of legislation that is similar to the pre-1997 wording?

Published DWP guidance on ESA focuses only on the basic requirements and the assessment process (Directgov, 2009). It includes little about how individual descriptors should be interpreted. Equally, little or no medical guidance has been published. The published DWP guidance on ESA, the DWP's extensive internal guidance manual, is also surprisingly silent and gives remarkably little in the way of guidance about the meanings of the ESA descriptors (Directgov, 2009).

The ESA50 questionnaire poses the following:

'While you are awake, do you have fits or blackouts? This includes epileptic fits and

Table 2
ESA Descriptor 11 (Schedule 2)

Remaining conscious during waking moments	(a)	At least once a week, has an involuntary episode of lost or altered consciousness, resulting in significantly disrupted awareness or concentration.	15
	(b)	At least once a month has an involuntary episode of lost or altered consciousness.	9
	(c)	At least twice in the six months immediately preceding the assessment, has had an involuntary episode of lost or altered consciousness.	6
	(d)	None of the above apply.	0

absences and diabetic hypos. If you have a problem with fits or blackouts, do you get a warning that it is going to happen?’

The word ‘includes’ might suggest that descriptor 11 should have a broader definition than its predecessor but, ultimately, the task of interpreting descriptor 11 will fall to the Upper Tier although it may be some time before a suitable case is decided.

Conclusion

When read together, the terms ‘*remaining conscious during waking moments*’ and ‘*resulting in significantly disrupted awareness or concentration*’ in descriptor 11 are quite compatible with Commissioner Jacobs’ approach. However, mindful of Judge Lane’s authoritative views, the emphasis must be on the effects of the ‘episode’. Provided it is demonstrated that there are significant rather than very minimal effects, we suggest that those who are significantly affected by migraines, vertigo or even significant levels of pain could satisfy the terms of descriptor 11.

The law appears to compound a more liberal definition of lost and altered consciousness than the medical profession, but only time will tell. In our second paper we will seek to provide some practical guidance for advisers assisting applicants in this difficult area.

Note

Paul Sandford and Ed Cooper are writing in a personal capacity.

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R (IB) 3/04.

Endnotes

¹All IB/ESA decisions made by the DWP carry a right of appeal to a first instance tribunal. Until the appellate tribunal structure was altered in late 2008, appeals from first instance tribunals were heard by the Commissioners for Social Security. Subsequently, the Commissioners were re-designated Judges of the Upper Tier of the Social Entitlement Chamber.

² This independently constituted committee is the main UK governmental advisory committee on social security matters. Its input in relation to the amendments to the 1995 regulations has particular significance. One of its roles is to scrutinise new or amending legislation.

³ Tribunals of Commissioners, referred to since 2008 as three-judge panels, were occasionally convened to resolve cases that raise particular points of public importance or in which there were very marked differences of opinion between individual commissioners.