The Individual's Rehabilitation – Possibility or Right?

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Background

The Swedish word *rehabilitering* (rehabilitation) is a general term covering all measures of a medical, psychological, social and occupational nature which may assist those who have been ill or injured to regain maximum functional ability and restore the conditions required for a normal life. Different authorities, or principals, are responsible for the various areas.

The public health authorities are responsible for medical rehabilitation, while the municipal/social services are in charge of the social aspects. Responsibility for occupational rehabilitation is shared by the labour market authorities, the social insurance office and the employer. The responsibility for coordination rests with the social insurance office.

Occupationally oriented rehabilitation refers to the measures required to assist an absentee to regain his or her capacity for work, thereby making it possible to support himself/herself through gainful employment.

The employer is primarily responsible for identifying and determining the need for rehabilitation, for ensuring that rehabilitative action is taken, and for financing such measures. Financial responsibility is, however, limited to measures that can be taken within, or in conjunction with, the framework of the company's operations. The employee should be offered continued employment by the employer, and other alternatives should be explored only when this possibility is exhausted.

This chapter will examine the legal position of the individual insured person from the point of view of the insured person's possibility of being, or right (in the legal sense, i.e. where there is a possibility of review) to be, the object of a rehabilitation programme and also from the point of view of her/his obligations in connection with the rehabilitation process. I will begin by studying the concept of "possibility".

The "possibility" concept

Under Chapter 22, Section 1, of the National Insurance Act an insured person who is registered with a social insurance office or who is entitled to sickness allowance under Chapter 3, Section 1, second paragraph, has the "possibility of rehabilitation" and the "right to rehabilitation allowance" under the provisions of Chapter 22 of the Act. In other words no lawful right to rehabilitation is written into the current wording of the Act. The right is limited to apply to the actual benefit during rehabilitation, which is described below. It is important to keep this distinction in mind.[1]

Occupational rehabilitation is very closely connected to the question of the right to benefit. The close link between the right to rehabilitation allowance and the possibility of rehabilitation, which has meant that the basic concepts of sickness and incapacity for work have become very relevant to the possibility of obtaining rehabilitative assistance and rehabilitation allowance, is very apparent.

What is meant by "possibility"? There is no explanation in the legislative material for the choice in the formulation of the Act of the word "possibility" for what is available to the individual.[2] In ordinary language the term "possibility" is taken to mean "an opportunity/a chance".[3] The concept is then seen almost as a situation that arises at random without the influence of the individual. But the legal meaning of the term "possibility" has to be seen as vague. It is difficult to determine from the term alone what the legislator intended. Questions which inevitably arise are which insured persons are to be given the possibility of rehabilitation and in which situations the possibility becomes reality.

In practice it has turned out that many of those who need some form of rehabilitation do not obtain it. It has been possible to ascertain that factors such as which officer the insured person encounters and the individual's own attitude are crucial to whether attempts to rehabilitate will be made or not, and to how successful these will be. Surveys also show that the type of measure offered depends on such factors as gender, age, place of residence, and occupation. Research so far carried out shows that older people and immigrants become the object of rehabilitative measures to a lesser extent.[4] The fact that the unemployed sick are discriminated against in the rehabilitation process is shown in a thesis dealing with occupational rehabilitation for the unemployed sick in a Swedish rural area.[5] In practice it therefore appears that the allocation of rehabilitation is not characterised by the principle of

[1] National Social Insurance Board general advice 1991:12 p 5 prescribed however that with the rehabilitation reform of the early 1990s the individual has the right to demand that rehabilitation resources are made available to the person concerned. This is not consistent with the wording of the Act.
[2] Government bill 1990/1991:141 and SOU (Swedish Government Official Report) 1988:41.
[3] Nationalencyklopedins ordbok, andra bandet [National Encyclopedia Dictionary, Volume Two], bokförlaget Bra Böcker 1996.
[4] SOU 1998:104 s 143 ff.
[5] Marnetoft, Sven-Uno (2000), Vocational rehabilitation of unemployed sick-listed people in a Swedish rural area.

equality and similar treatment. In addition it is very difficult to determine which factors are relevant to whether the insured person is included in the offer of rehabilitative measures or not.

The regulations contain little to indicate that the legislator wishes to see the insured person as active at an initial phase, in the sense of taking the initiative in arranging rehabilitation and determining that it should come about. One thing that may appear to point in such a direction in the legal text is the provision that imposes on an employer an obligation to carry out a rehabilitation enquiry when the insured person requests it under Chapter 22, Section 3, of the National Insurance Act. However the employer has the right to omit to carry out such an enquiry if it is considered unnecessary.[6] The fact that the decision on rehabilitation is now regarded as appealable in certain respects (see below) may be seen as a step towards the possibility of an increased activity on the part of the individual, which may indicate a growing wish to see the individual become more active.

The fact that the insured person has a possibility of rehabilitative assistance and not a right to it might almost be interpreted as meaning that rehabilitation is to be initiated without the collaboration of the individual. As from 1 July 2003 the employer has a duty to carry out a rehabilitation enquiry (in three stated situations). But it is only when the employer or the social insurance office presents a rehabilitation programme that the individual is expected to take a positive part and cooperate actively. This state of affairs may of course be criticised, and so it has been. It has been asked whether it is right that the insured person should be at the mercy of the opinions of outsiders (e.g. the rehabilitation officer's or the employer's opinion) on the need for her/his own rehabilitation, and have no opportunity of initiating action herself/himself. This circumstance is not compatible with the prevailing view that great weight should be attached to the individual's particular situation, needs and commitment, and that these should guide the rehabilitation process. The criticism is lent extra weight by the fact that the insured person is also expected to be active and to participate when the process has started (and then by someone other than the insured person herself/himself).

Moreover there is today no consensus regarding the criteria on which the determining of priorities in rehabilitation activities should be based. This naturally makes it very difficult for the insured person to work out in advance when he or she actually has a possibility of rehabilitation. This being so, a report on occupational rehabilitation (SOU 2000:78) presented an entirely new proposal for an ethical platform, which would form the basis for setting priorities among rehabilitation projects.[7] The report did not lead to any legislation.

[6] SOU 1998:104 s 74.
[7] SOU 2000:78 p 317 ff.

Appeal against decisions on rehabilitation

The fact that Chapter 22, Section 1, of the National Insurance Act speaks of the individual's prospects of obtaining rehabilitation as a *possibility* used to be interpreted in previous adjudications as meaning the individual could not appeal against a decision not to plan or take rehabilitative measures. Decisions on rehabilitative measures were regarded as non-appealable decisions while being made and not as social insurance decisions under the National Insurance Act.

The individual depended on either the employer or the social insurance office to be of the opinion that there was a need for rehabilitation and to choose to finance the measures decided upon. All that the individual wishing to receive such rehabilitative assistance as was available could do was to express a wish for a particular necessary action to be taken. If those in power decided that such action should be not taken, the individual had a problem, because he/she had no means in law of forcing rehabilitative measures to be taken.

In the mid-1990s, however, it was laid down that certain decisions concerning rehabilitation may in fact be appealed against by the individual. A landmark decision of the Swedish Supreme Administrative Court examined whether a decision on rehabilitation was to be reviewed under Chapter 20, Section 10, of the National Insurance Act. The Supreme Administrative Court decided in this case (22 November 1996, case no. 10057-1995) that a social insurance office decision not to buy an occupational rehabilitation service for an insured person should be reviewed under the National Insurance Act, provided that this was requested by the insured person and the decision was appealable in the sense that it had gone against the individual.

As grounds for the decision it was stated that at the time of making the decision the social insurance office had a duty to ensure that rehabilitative action was taken when there was a need for such, for which reason a decision on the rehabilitation concerned was statutorily a decision in an insurance case under the National Insurance Act. For this reason it was considered that the decision could be reviewed if requested by the insured person.

This judgement has implications both for the individual insured person and for the handling of rehabilitation cases by the social insurance offices. Where the social insurance office does not intend to buy a particular occupational rehabilitation service which the insured person claims, the office now has to issue a decision giving instructions for application for a review. Whether the insured person really demands that the office buy the disputed rehabilitation service, or is only discussing various alternative forms of rehabilitation, is, according to the information issued by the then National Social Insurance Board, to be considered in the individual case. However there should be a clear and distinct proposal, preferably in writing, of a specific action.

Refusal to take part in rehabilitative programme

The obligation to take part in a rehabilitative programme may undoubtedly be of a character that encroaches on personal freedom or integrity. The question of the extent to which an insured person is obliged to submit to rehabilitative measures is taken up in the preparatory material to the current National Insurance Act.

Most people who are potential candidates for rehabilitation are already in a difficult situation, with sickness and incapacity for work interfering with the normal pattern of life. This may naturally tend to make it seem very dubious whether the situation may be allowed to be "aggravated" by the fact that the process also entails specific obligations. The rehabilitative measures suggested by, for example, the social insurance office or the employer are not infrequently of such a kind as to be seen as an infringement of integrity, if they are contrary to the individual's wishes.

Occupational rehabilitation may involve very varied measures. There may be requirements for the individual to undergo extensive examinations or treatments, receive physiotherapy etc. Implementation of rehabilitative measures of a medical nature may put the individual in an exposed position, both mentally and purely physically, where she/he may be in a position of dependency and subordinate to health care personnel. Other rehabilitative measures, too, that may be considered conducive to occupational rehabilitation may contain elements which are felt to be very "personal". This may infringe personal integrity. The measures may be of such a nature as to lie within the area where the individual herself/himself ought to be allowed to decide.

A withdrawal of benefit presupposes that the insured person is at the time of withdrawal entitled to financial benefit in the form of sickness allowance or rehabilitation allowance. This implies that the consideration of the requirement for sickness or incapacity for work in accordance with Chapter 3, Section 7, of the National Insurance Act has previously taken place and that on the occasion of this consideration the insured person has been regarded as satisfying the requirements in this respect. Despite the fact that the person is entitled to financial compensation under the sickness insurance scheme following the customary assessment of sickness and incapacity for work, the financial benefit is withdrawn on the grounds that the insured person is not meeting the requirements laid down for "active participation". Herein lies the element of sanction.

A number of test judgements[8] emphasise that caution should be observed in withdrawing an insured person's rehabilitation allowance.[9] These instructive cases therefore indicate some restriction on the social insurance office's freedom to apply the sanction in Chapter 20, Section 3, of the National Insurance Act. The rehabilita-

[8] Since 1 July 1995 the Swedish Supreme Administrative Court has been the highest forum for matters of sickness insurance and rehabilitation.

[9] See for example FÖD [Swedish Superior Insurance Court] 19 December 1994 Case no. 1729/92:9.

tive action proposed to the insured person must for example be definite and unambiguous in substance,[10] benefit may not be withdrawn as long as the attempt at rehabilitation continues,[11] reminders about the sanction must be given in an acceptable manner[12] etc.

However these restrictions that have arisen in the application of the law do not prevent withdrawals occurring. The interventionist nature of the rehabilitative measures as described above ought therefore to be considered in relation to the fact that the consequences of a refusal to participate actively in rehabilitation may affect the insured person quite severely. Losing one's sickness allowance may undoubtedly have serious consequences for the individual and rule out any possibility of self-support. At worst, withdrawal of benefit may result in having to resort to an application for financial assistance under the Social Services Act. It is not unusual for the person concerned to find herself or himself in a grey zone between different authorities. The situation may be such that the individual has no chance of obtaining, for example, labour market support, study assistance or other possible benefit.

One of the ultimate aims of sickness insurance – giving financial assistance to persons who as a result of sickness have suffered a reduction in their working capacity – becomes obscured in a withdrawal situation by another aim – namely that of promoting active rehabilitation from the point of view of the individual. The result of a withdrawal under Chapter 20, Section 3, of the National Insurance Act as a result of inadequate participation in a rehabilitation programme is that the person who does not take an active part in the attempts at rehabilitation is no longer picked up by the social insurance scheme either.

In the social policy debate the question has often arisen of what requirements it is reasonable to impose on the individual to whom social benefits are granted. The financial benefit may be regarded here as a tool with which to motivate, control or influence citizens. The authorities set out certain demands and have the threat of sanctions as a means of countering undesired behaviour.[13]

For natural reasons this approach may make for more efficient administration. The threat of losing the financial benefit may have the effect of putting powerful pressure on the individual to take the course desired by the administration. However there is a risk that the autonomy and personal integrity of the individual suffer from serious encroachment owing to the position of dependency in which the individual often finds herself or himself in such situations.

[10] FÖD 22 November 1993 Case no. 2667/90:7.
[11] FÖD 29 October 1992 Case no. 1041/89:3.
[12] FÖD 19 December 1994 Case no. 1729/92:9.
[13] Kjönstad, Asbjörn m fl (1993), Sosial trygghet og rettssikkerhet – under sosialtjensteloven og barneverntjensteloven, p 115 ff.

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