**Commissioner's File: CIB 14442/96 (\* /97)
Mr Commissioner Howell QC
29 April 1997

DEDDFAU NAWDD CYMDEITHASOL 1992
*SOCIAL SECURITY ACTS 1992*

APEL YN ERBYN DYFARNIAD TRIBIWNLYS APEL NAWDD CYMDEITHASOL YNGHYLCH CWESTIWN CYFREITHIOL
*APPEAL FROM DECISION OF SOCIAL SECURITY APPEAL TRIBUNAL ON A QUESTION OF LAW*

DYFARNIAD Y COMISIYNYDD NAWDD CYMDEITHASOL
*DECISION OF THE SOCIAL SECURITY COMMISSIONER***

*Cais am/Claim for:* Incapacity Benefit
*Tribiwnlys/Appeal Tribunal:* Pontypridd SSAT

[GWRANDAWIAD/ *ORAL HEARING*]

1. For the reasons given below the decision of the social security appeal tribunal given on 25 March 1996 on this claim for incapacity benefit was in my judgment erroneous in point of law. It must be set aside and the case referred to a fresh tribunal to reconsider the whole case in accordance with the guidance I shall attempt to give below.

2. I held an oral hearing of this appeal at which the claimant appeared and was represented by her husband. Miss Rhian Rees of the DSS Solicitor's Department appeared for the adjudication officer.

3. The claimant is a lady now aged 56 who suffers from degenerative arthritis and hypertension. The arthritis unhappily affects many of her joints but is particularly bad in her shoulders, arms and back. The disease restricts her general ability to move and manage things with her arms and makes it painful and difficult for her to walk, stand or even sit for long periods. In consequence of this it has been accepted that she has not been able to work and has been entitled to sickness and invalidity benefit since 5 September 1990, but following the change to the new incapacity benefit and a fresh medical examination applying the new rules she has now been found capable of work after all despite her continuing condition. She appealed to the tribunal against the decision of an adjudication officer reviewing her case and terminating her entitlement to benefit from 6 December 1995.

4. Applying the "all work test" under what are now ss. 30A-E and Part XIIA Social Security Contributions and Benefits Act 1992 and the Social Security (Incapacity for Work) (General) Regulations 1995 SI No. 311, the tribunal on 25 March 1996 rejected her appeal and held that she was not incapable of work or to be treated as incapable of work, so that she was not entitled to incapacity benefit from and including 5 December 1995: see pages 55-60 in the case papers.

5. Against that decision the claimant appeals on grounds set out in her notice of appeal dated 20 April 1996 at pages 61-64 and developed by her husband on her behalf in his well and moderately presented submissions at the appeal hearing. The main ground of appeal is that the tribunal in their decision failed to pay proper regard to medical evidence produced on behalf of the claimant from her general practitioner relating in particular to her difficulties with walking and sitting for long periods, and failed to give an adequate explanation as required by reg 23 Social Security (Adjudication) Regulations 1995 SI No 1801 of their reasons for rejecting the evidence that she suffers a high level of disability on these aspects in particular.

6. On behalf of the adjudication officer Miss Rees opposes the appeal on those issues, though she concedes that the decision is technically erroneous on a different ground put forward by the adjudication officer in written submissions, that the tribunal had based part of their decision on reg 27 of the incapacity for work regulations which had later been held void by the High Court in *R v. Secretary of State ex parte Moule* (unrep 12 September 1996; transcript pages 94-109).

7. In the decision in cases CIB 13161/96 and CIB 13508/96 I attempted to set out my understanding of the way the all work test under the new legislation has effect, and I will not repeat that here. In the present case having considered the arguments for both sides I am satisfied that the way the evidence on the claimant's ability to sit or stand for long periods, or to walk for anything more than a short distance, was dealt with by the tribunal and recorded in their decision was defective; and that this may have had a material effect on their decision about the right descriptors for these activities.

8. In particular, I have not been satisfied that they gave adequately reasoned consideration to the report of the claimant's GP dated 27 February 1996 at page 66 in the papers, referring in particular to the osteoarthritis in her knees and her shoulders as well as to the painful condition of her lower spine. No specialist medical knowledge is needed to understand the importance of such evidence to the question of the right descriptor under the table in the schedule to the Incapacity Regulations. The pain and arthritis in her shoulder and lower back would of course make a big difference to the question of how long she could sit "comfortably" in an upright chair with a back but no arms (which is activity 3), and coupled with that in her knees would be of direct relevance to how long she could stand without support or assistance or walk along without stopping or severe discomfort for activities 1 and 4.

9. Below the details the doctor gave in his own handwriting on page 66 in response to a general enquiry about the nature of the claimant's medical condition, he gave the answer Yes to two specific questions asked by the claimant's CAB representative (who had prepared the form) about whether the claimant could not sit comfortably in an upright chair for more than 30 minutes and whether she could not walk for more than 200 metres without having to stop or without feeling severe discomfort. These answers put the claimant in a higher scoring descriptor in activities 1 and 3 than had been picked by the adjudication officer on the basis of the report form completed by the examining medical officer on 29 November 1995: see pages T23-52. The result if the higher descriptor was applicable for *either* of those two activities would have been to give the claimant 15 or more points on the descriptor table, instead of the 12 accepted by the adjudication officer as applicable to her (see page 52): and so to entitle her to the benefit.

10. Given the pivotal importance of the evidence for that reason, the way the tribunal dealt with the GP's report on page 66 was in my judgment inadequate. They said:-

"Sitting - the medical report of the examining medical officer is accepted by the tribunal. The answer to the questionnaire by the appellant's GP is acceptable as far as it goes on this and the other point, i.e walking, but the form of the questions put is such as to invite the reply required by the questioner. The evidence of the appellant was considered carefully by the tribunal, but it was felt that she was capable of sitting for long periods without too much discomfort.

Standing - 30 minutes is agreed. Walking - the evidence of the examining medical officer is that she has full range of knee movements and no swelling ... and that she visits her daughter, goes shopping and occasionally goes for walks."

The descriptors for bending and kneeling, and reaching, were said to be "agreed" although the claimant had on her original form (at page 11) in fact picked two descriptors and only the lower one had been awarded to her by the adjudication officer.

11. I find some ambiguity in the passage I have quoted from the tribunal's decision to explain the way they were dealing with the GP's evidence. Either they were accepting what he said or they were rejecting it. To say that it was "acceptable as far as it goes" but then in effect to reject it by confirming the lower descriptors picked by the examining medical officer is in my judgment inconsistent. I do not think the fact that the GP had been asked to give a yes/no answer on two specific descriptors without being presented with the whole range, and had done so, was by itself a sufficient reason for rejecting the evidence. The GP is a professional person, and as the claimant's husband pointed out nobody was forcing him to give one answer rather than the other. If he had thought that the question he was being asked gave an exaggerated description of the claimant's true level of disability he could easily have said so, for example by indicating a walking range of 300 or 400 metres instead of 200.

12. Moreover the GP clearly did direct his mind to the specific difficulties of the claimant's condition. Describing it in para 2 on page 66 he put on a handwritten note that the osteoarthritis in her knees was accompanied by locking, a factor that would have a very material effect on her ability to walk any distance without severe discomfort. On this aspect, the tribunal's suggestion that the GP was giving a reply that had been put into his mouth by the claimant's representative is simply and obviously untrue. Significantly in the same context, the tribunal appeared to have taken no account of the finding by the examining medical officer on examination on page 26 that movement of the claimant's right knee was accompanied by clicking, though they do note the other findings about the full range of knee movements with no swelling.

13. Taking all this into account I have reached the conclusion that the tribunal gave a less than adequate explanation of their reasons for reaching the conclusions they did in view of the medical evidence before them. Their decision must therefore be set aside as erroneous in point of law and the whole case reconsidered by a fresh tribunal.

14. That makes it strictly unnecessary for me to pronounce on the other issues raised in argument, but it may be helpful to the new tribunal if I say that I have some doubt whether the treatment of the standing, bending and kneeling and reaching descriptors was adequate either. On each of these the tribunal simply recorded that there was agreement on the descriptor put forward by the adjudication officer, and appear not to have directed their own minds to making a judgment on whether these were correct.

15. I would emphasise that in incapacity benefit cases just as much as in other appeals coming before tribunals under the Social Security Acts, the function of the tribunal is an inquisitorial one, whose object is the ascertainment of the claimant's true entitlement and the determination of all relevant questions whether or not these have been formally put in issue before them. In the present case there was at least some cause for further question about whether the descriptors picked by the adjudication officer truly reflected the extent of the claimant's disability in view of the state of the medical evidence by the time the matter came before the tribunal at the hearing. I do not think that in all cases the tribunal should regard the scope of their enquiries as circumscribed by the boxes claimants may or may not have ticked at an earlier stage on the long and very complicated forms they are now required to fill out. That the form apparently did cause this claimant some confusion is evident from the fact that she ticked two descriptor boxes against "bending and kneeling" on page 11, one of which would have given her 15 points in its own right and the other only 3. In my judgment, the tribunal should have gone further into this question (on which the condition of the claimant's knees, shoulder and lower back was of course of crucial importance) rather than simply recording the lower scoring descriptor as "agreed" as they did on page 57.

16. By the same token, although on page 13 she had only ticked the box that indicated she had difficulty with her left arm, the comments she added about her difficulties with lifting should in my view have alerted the tribunal to the possibility that she might have equal difficulty with lifting potatoes or other things with either arm, in view of the pull this would impose on her shoulder. And although on page 8 she had ticked only the box that indicated she could not stand without having to move around for more than 30 minutes, her comment about pain in the back and knees coupled with the medical and other evidence that emerged later should in my view have alerted the tribunal to the possibility that this was a claimant who really needed to have a sit down after standing in one place for 30 minutes, rather than just to be allowed to move around, so that the other box with '30 minutes' printed against it less than 2 centimetres away on the same page of the form was the one she really should have ticked and gave a more accurate description of her condition. Similarly if only the 3 point descriptor was being awarded to the claimant for walking as the tribunal did, a proper consideration of her case should in my judgment have included whether her difficulties with her knees and back made a higher scoring descriptor applicable to her under the 'walking up and down stairs' activity, with which her original form on page 10 had indicated she had difficulty although no specific descriptor box had been ticked.

17. The alternative ground very fairly put before me by Miss Rees, based on the tribunal's reference to regulation 27 of the incapacity regulations, does not on analysis amount to an error of law in the circumstances of this case. Reg. 27 in its original form provided for a person who did not score the required number of points on the all work test to be treated exceptionally as incapable of work if in the opinion of the doctor he fell within one of a small number of very restrictive categories such as people suffering from a previously undiagnosed potentially life threatening condition. On the basis of the decision in *ex parte Moule* cited above, if any issue had arisen as to whether the claimant fell within one of these categories it was an error of law for the tribunal to regard that as concluded against the claimant merely because no doctor had pronounced in her favour, since the relevant decision was required by the primary legislation to be made by adjudication and subject to appeal in the normal way. However there is (happily) no question of the claimant in this case being so badly ill as to fall within *any* of the special exceptional categories in reg 27, either in its original form or in the form to which it has been amended since 6 January 1997 (1996 SI. No. 3207). In those circumstances, although what the tribunal says about reg 27 in para 8 on page 56 is incorrect as it stands in the light of *ex parte Moule*, it was in my judgment simply irrelevant and did not affect the validity of their decision on any issue that was actually before them.

18. The appeal is accordingly allowed and the case remitted to a new tribunal sitting with a medical assessor for a complete rehearing of the entire question of the claimant's capacity or incapacity for work under the all work test. It will be open to her to put forward at the rehearing any further or more detailed medical evidence that she wishes to support her case.

**(Signed)

P L Howell
Commissioner
29 April 1997**