[redacted]

CIB/1239/2004

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. My decision is that the decision of the appeal tribunal was erroneous in point of law. I set it aside and, in pursuance of the power in that behalf contained in section 14(8)(a)(i) SSA 1998 I give the decision which I consider the tribunal should have given. That decision is that the claimant satisfies descriptor 3(d). Accordingly, his score reaches the threshold of 15 points and he has, notwithstanding the purported supersession, at all times been entitled to incapacity benefit.

2. This is an appeal with leave granted by the chairman from the decision of an appeal tribunal dated 13.1.01. When granting leave to appeal, the chairman commented (84):

> "In relation to CIB/0884/2003 what is the extent of the tribunal's obligation to consider the amendments to descriptors made by the Social Security (Incapacity for Work and Miscellaneous Amendments) regulation 1996 when they have not been put in issue before the tribunal."

I consider the effect of the decision in Howker v. Secretary of State for Work and Pensions R(IB) 3/03 later. But, if the effect of Howker is to remove the words from the descriptors involved, then clearly it is the duty of the tribunal to consider the legislation as interpreted on the basis of Howker – and CIB/0884/2003 – notwithstanding no point was expressly put to them on that basis. The Tribunal has to decide the case on the basis of the existing relevant law. I hope I have not misunderstood the point being made.

3. The claimant suffers from lumbar spondylosis, and has painful knees. According to what he told the EMP, he also suffers from piles, which might well have an influence of sorts on his ability to sit for any long period. He claimed, and was awarded, incapacity benefit on 18.10.01. He duly completed the usual PCA questionnaire, claiming benefit for sitting, saying that he could not sit comfortably for more than 30 minutes without having to move from the chair. He also claimed a variety of other points bringing a total score, on his estimation, of 13 points, 2 fewer than the required threshold for benefit. The EMP scored him no points at all. As for sitting, the EMP does not appear to have made any specific comment but, at p37, did comment that there was no clinical evidence of significant incapacity. The original award was therefore superseded by the DM.

4. The claimant appealed to an appeal tribunal, who heard the appeal on 13.1.04. They had before them a submission from the rep (64/6), which claimed total points well in excess of those put forward by the claimant. They also had a questionnaire from Doctor Bright, his GP. That took the form of questions viz "(the claimant says etc. Do you agree?" I, and my colleagues, haven often deprecated the use of such questionnaires as they suggest the answer desired by the questioner and in that sense, the questions are leading. I pay no attention to that questionnaire nor is there any need to do so.

5. The appeal tribunal awarded 3 points each for walking; walking up and down stairs (which doubles up with walking); rising from sitting; standing; and bending and/or kneeling. That gave a net score of 12, still short of the threshold. However they, carefully looked at sitting, and decided that he only qualified under 3(e) – cannot sit comfortably for more than 2

hours without having to move from the chair [because the degree of discomfort makes it impossible to continue sitting]. The words in brackets had been added to descriptors 3(b), (c), (e) and (d) by Reg 2 (11)(b)(i) of the 1996 Amendment Regulations. In Howker (supra) the Court of Appeal held, when considering regulation 27 of the 1995 Regs substituted by reg 2(9) of the 1996 Regs, decided that it was ultra vires and struck down the words I have underlined because the statutory instrument had not complied with the correct Parliamentary procedure. The relevant amendment, in this case, was not made by para 2(9) but by para 2(11)(b)(i). In CIB/0884/03, the Commissioner held that the Howker principle was equally applicable to Reg 2(11)(a)(iii) of the 1996 Regs. I confess I can see no reason for distinguishing this case from that. In my view, the principle is clearly equally applicable here. Para 3(b)(c)(d) and (e) must therefore be construed without the offending words in brackets, [because the degree of discomfort makes it impossible to continue sitting]."

6. Does this matter? In my view, the words in brackets I have struck out do sensibly alter the meaning of the descriptor in question. Those words, in my view, connote a high degree of discomfort which means that, albeit maybe only temporarily, the claimant cannot continue to sit. The words of the descriptor, without the offending words, in my view, connotes some lesser degree of discomfort which, while not making continued sitting actually impossible, necessarily means that the act of moving from the chair affords some relief. There is a difference between not being able to continue sitting comfortably and not being able to continue sitting because the discomfort makes it impossible.

7. The tribunal should therefore have considered the descriptor without the offending words in brackets. That must have some effect on how long it takes a claimant to satisfy any relevant condition.

8. What however did the tribunal do? It is not – at any rate, in my view clear, whether they accepted the text before or after the Howker principle had effect, though it is certainly possible that they ignored the Howker principle having regard to the comments made by the chairman when granting leave to appeal. What they said was this:

> "In the questionnaire [the claimant] claimed he could only sit for 30 minutes before having to move from his chair. In his own grounds of appeal, he claimed he could not sit for 10 minutes before having to move. [In fact he said 30 minutes rather than 10]. In the written submission from his representative, [the claimant] claimed he could only sit comfortably for 30 minutes as confirmed by Dr Bright, but it was not clear whether it was claimed on [the claimant's] behalf that he had to move from his chair after 30 minutes because the degree of discomfort made it impossible to continue sitting or whether he had to move about in his chair to ease the pain he was suffering as a result of sitting."

I would note that the relevant descriptor speaks of moving from the chair rather than moving in the chair.

> "In evidence [the claimant] claimed he had to get up from his chair after sitting for 30 minutes, having moved about after 10 – 15 minutes. [That is presumably moving about in his chair]. After getting up and moving about he would sit down again. Walking about eased the pain and made him feel better. From time to time he flew to Italy to visit his family but claimed he got up from his seat now and again to ease the

pain. He travelled by bus to Gatwick Airport, but got up from his seat and moved about in the gangway of the bus. He still drives a car, but not very far, to Cardiff - 12 miles, and Cwmbran – 5 miles. The hearing lasted for more than 40 minutes and [the claimant] sat throughout without any apparent discomfort and did not move about in his chair. Having seen and heard [the claimant] give evidence, we concluded that the EMP's expert and detailed report [I note there was no detailed finding about sitting] and opinion was more reliable than [the claimant's] own estimate of his difficulties. In giving his opinion, Dr Bright merely repeats what his patient told him and he does not explain why he agreed with him. Further [the claimant] told the EMP that pain was worse with prolonged sitting – about 1 hour."

The tribunal therefore thought he could sit comfortably for more than 2 hours without having to move from the chair and awarded no points. The claimant for incapacity benefit therefore failed.

9. Now it appears to me that all the evidence that reasonably be relevant has been gathered and is now before me. It would be a waste of time and money for me to send the case back for further evidence and findings. I therefore decide the substantive issue myself. I take on board the points made in the grounds of appeal by the representative viz that the tribunal chair was not an upright chair with a back and no arms, as required by the descriptor, but more comfortable, and the same goes as regards the coach and aeroplane seats. I also bear in mind my conclusion on the effect of the Howker principle, so that the measure of discomfort is less than that which is posited by the 1996 Amendment. All in all, in my view of the evidence a finding that the claimant can sit for more than 2 hours is not justified – but a finding that he could for 1 to 2 hours is. Accordingly, descriptor 3(d) is satisfied bringing the claimant's score to 15, thus satisfying the threshold.

10. My decision is therefore as set out in para 1 above.

(Signed) **J M Henty**
Commissioner

(Date) **15 July 2004**