# DECISION OF DEPUTY SOCIAL SECURITY COMMISSIONER

## Decision

1. I hold that the tribunal erred in law. I therefore remit the appeal to a differently constituted tribunal to re-hear the appeal. I direct that the claimant is to be given an opportunity to argue as a preliminary point that there were no grounds to warrant a review.

## Background

2. The claimant was awarded incapacity credits from 23.07.01. On 21.03.02 he completed an IB50 Questionnaire and was medically examined on 31.07.02. The points claimed were only related to the claimant's mental condition arising out of anxiety and depression. On 26.08.02 the decision maker, having considered all the evidence, awarded 5 points under the mental assessment and 0 points under the physical assessment. As this was less than 10 points the decision awarding incapacity credits was superseded from and including 26.08.02.

3. The BAMS Report states that the examination and interview started at 08.45 and ended at 09.00 with the Report completed at 9.10.

4. The claimant submitted a request for an appeal. He was asked to attend an appointment with the Social Security Office, but on advice from a welfare rights office chose not to attend. The decision was sustained on a reconsideration.

## Appeal to the tribunal

5. The claimant appealed to the tribunal. As a preliminary issue the claimant's representative argued that the tribunal should first be satisfied that the Secretary of State had satisfied the burden of proof, to show that the claimant was no longer entitled to the benefit. It should be noted that in the submissions to the tribunal the decision maker had accepted that the burden lay on him to show that the claimant had ceased to qualify for the benefit.

6. It would appear that this argument was presented on the basis that a medical examination lasting 15 minutes could not be sufficiently good to overcome that burden. It would appear that the Tribunal decided to hear the appeal, without determining that submission. I say "appear" because the submission is recorded in the Record of Proceedings, which are difficult to read, but is not recorded in the statement of reasons. There is a finding in the Statement of Reasons that the medical examiner carried out the assessment within 15 minutes and that "this was not such a short period of time as to bring the validity of the assessment into question and found that the personal capability assessment had been validly conducted."

7. The Tribunal disallowed the appeal and confirmed the decision of the Secretary of State issued on 26.08.02. It would appear from the Statement of Reasons that the tribunal reviewed the record of the personal capacity assessment made by the medical examiner having regard to the evidence of the claimant. They changed some of the assessments and

reached a conclusion that the claimant was entitled to 6 points in respect of the mental descriptors, one more than the decision maker.

**Appeal to the commissioner**

8. The claimant appealed to the commissioner on two points:

a. that the tribunal failed to show any regard in its reasons to the points made at the outset to the effect that the tribunal had to rule on the question of whether or not the burden of proof had been discharged;
b. that by proceeding in the way that it did, the tribunal effectively placed the onus of proof on the appellant.

9. The Secretary of State supported the appeal, but submitted that despite erring in law, the tribunal made the only decision, which a tribunal properly instructed as to the law could have made.

**Reasons for decision**

10. I agree with the claimant, and as was accepted by the decision maker in his submission to the tribunal, that the onus is on the Secretary of State to show that *prima facie* there was evidence to justify a review of the entitlement to benefit. If the Secretary of State cannot show that there was a *prima facie* case, then the entitlement to benefit continues and the claimant does not have to justify his incapacity.

11. The matter was considered by Mr Commissioner Mesher in CIB/3899/1997, where he reviewed the case law. He said:

> "14. Mr Heath submitted that that reasoning required that if an adjudication officer or an appeal tribunal, looking at the evidence of a claimant's current condition, was satisfied that the claimant scored less than 15 points from physical descriptors on the all work test, there must be a ground of review of a previous decision that the claimant was incapable of work having satisfied the all work test. I disagree. The approach approved by the Tribunal of Commissioners in CSIS/137/1994 does not warrant looking at the evidence of the claimant's current condition in isolation from the evidence on which the previous decision that the claimant was incapable of work on the all work test was based. Indeed, the Tribunal of Commissioners specifically referred to the requirements for entitlement ceasing to apply and to the claimant being no longer incapable of work. That indicates a comparison of the present with the past. I accept that as a matter of practice an appeal tribunal may start, as indicated by paragraph 47(2) of the appendix to CSIS/137/1994; by asking whether it has been shown to its satisfaction that the all work test is not satisfied at the date of the adjudication officer's assessment. However, in considering whether that has been shown, the appeal tribunal must consider and give proper weight to the evidence on which the previous decision was based. Nor do I think that the intention in paragraph 47(2) was to lay down a rigid rule for all cases rather than a generally acceptable approach, subject to any special features in the particular circumstances of cases.
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> 15. Some cases will be straightforward. The new examining medical officer's report or other evidence may clearly point to particular improvements in the claimant's abilities and the reasons for the improvements. Other cases will not be so straightforward. The new examining medical officer's report may paint a very different clinical picture from the previous report, with the implication that the previous report over-emphasised the claimant's problems at the

time. The appeal tribunal would have to consider, in the light of all the other evidence, whether it was satisfied (the burden of proof being on the adjudication officer) that the new report accurately described the claimant's condition. Or there may be cases where the clinical picture painted in the two reports is substantially the same, but there are differences in the opinions of the examining medical officers about particular descriptors. For instance, there might be similar clinical findings on limitations on the claimant's walking ability, and similar statements by the claimant about actual walking, yet the first examining officer has ticked the box for "cannot walk more than 200 metres without stopping or severe discomfort" and the second has ticked the box for "cannot walk more than 400 metres". That makes the difference between 7 points and 3 points and could easily on its own make the difference between a total of 15 or more and of less than 15. In such circumstances, an appeal tribunal (and an adjudication officer) should think very carefully before concluding that the points to go into new all work test assessment are 3 and not 7 and being satisfied that the all work test is not met. Such circumstances (which I do not attempt to define with any precision at all) may well point to the proper starting point being consideration of whether it has been proved that there has been a change in the claimant's condition or a mistake by the first adjudication officer as to some material fact. Then, the principle (approved in CSIS/137/1994) comes into play that the expression of a new medical opinion is not itself a relevant change of circumstances, but may be evidence of an actual change of circumstances or a mistake of fact."

12. The point is put succinctly in paragraph 36 of the Appendix to the decision of the Tribunal of Commissioners R(IS) 2/97 where they say:

> "The adjudication officer must be affirmatively satisfied that the occasion for review has in fact arisen before conducting it; and a tribunal too must be similarly satisfied before they can uphold it or give their own determination in its place."

The appears to me to be the point that the claimant's representative was making when referring to the burden of proof in his opening submission.

13. Having regard to those passages I consider that it is clear that the claimant was entitled to raise the issue of whether or not the medical examiner's report made in 15 minutes was an adequate basis to justify a review. I appreciate that the tribunal have made a finding that the time was adequate for a proper report, but as I read the record of proceedings, the claimant's representative was saying that he wanted to make a submission along the lines that 15 minutes was not adequate, but that as the tribunal decided to hear the evidence of the claimant, that they did not in fact give him an opportunity to develop this submission. There was accordingly a breach of natural justice. The Commissioner reached a similar conclusion in CIB/3899/1997, where he held that as there was an arguable point on whether or not the tribunal could find that there was a ground for review and accordingly that the parties should have been given an opportunity to address that point.

14. I therefore hold that the tribunal erred in law. I shall remit the case to a differently constituted tribunal with a direction that the tribunal should hear any submissions that the claimant wishes to make in regard to whether or not the medical examiner's report made in fifteen minutes was an adequate basis, having regard to any other material that is adduced by either party. In the cases cited there is comment that there may have to be a comparison with the original decision and the medical examination upon which the decision to review was taken and the parties may wish to consider whether or not these should be produced.

15. As I consider there has been a breach of natural justice, and having regard to what was said in CIB/3899/1997, I do not consider that it is right to say that the decision reached

by the tribunal was the only decision that could have been reached, particularly on the preliminary point.

(signed)
Sir Crispin Agnew of Lochnaw Bt QC
Deputy Commissioner
Date: 23 October 2003