Starred Decision No.: 97/01
Decision No: C1/01-02(IB)(T)

SOCIAL SECURITY ADMINISTRATION (NORTHERN IRELAND) ACT 1992

SOCIAL SECURITY CONTRIBUTIONS AND BENEFITS (NORTHERN IRELAND) ACT 1992

SOCIAL SECURITY (CONSEQUENTIAL PROVISIONS) (NORTHERN IRELAND) ACT 1992

SOCIAL SECURITY (NORTHERN IRELAND) ORDER 1998

INCAPACITY BENEFIT

Appeal to a Social Security Commisisoner
on a question of law from a Tribunal's decision
dated 24 May 2000

DECISION OF THE TRIBUNAL OF COMMISSIONERS

1. This is an appeal by the claimant, against the decision of the Belfast Appeal Tribunal ("the Appeal Tribunal") given on 24 May 2000. Leave to appeal to a Commissioner was refused by the Chairman but was granted by Mrs Commissioner Brown on 4 April 2001. For the reasons which we give, that decision is erroneous in point of law. We therefore set it aside and refer the case to a differently constituted Appeal Tribunal ("the new Tribunal") for rehearing in accordance with the guidance given below

2. In exercise of the powers conferred on him by Article 16(7) of the Social Security (Northern Ireland) Order 1998 (SI 1998/1506 (NI 10)) the Chief Commissioner directed that this appeal should be dealt with by a Tribunal of Commissioners. A hearing was also directed and took place before us on 15 May 2001. The claimant was present and was represented by Mr Odhran Stockman of the Law Centre (NI). The Secretary of State was represented by Mr Seamus Toner of the Decision Making and Appeals Unit of the Department for Social Development. We are grateful to Mr Stockman and Mr Toner for their submissions.

3. In general terms, this appeal is concerned with whether or not the claimant satisfies the All Work Test introduced by section 167C of the Social Security Contributions and Benefits (Northern Ireland) Act 1992. Specifically, and for reasons that will become clear, we are concerned with whether or not the Appeal Tribunal was correct to refuse to look at the claimant's knee when he asked them to do so.

4. The background is as follows. The claimant, who was born on 22 July 1941, is nearly 60. He suffers from a number of problems including arthritis of the spine, problems with his knees and especially his left knee, high cholesterol, vertigo and asthma. For present purposes, he became unfit for work on 1 May 1999, and claimed and received Incapacity Benefit. He had not worked for some time and consequently the question of whether or not he was capable of work fell to be determined by the All Work Test. The process of assessing the claimant began in November 1999, when he was asked to complete an incapacity for work questionnaire and obtain a statement from his general practitioner. On 7 January 2000, he was examined by an Examining Medical Practitioner. On 7 March 2000, a decision maker considered the evidence. She decided that the claimant scored 3 points only on the grounds that he could not walk up and down a flight of stairs without holding on. A score of 3 points is not sufficient to satisfy the test, and since none of the exempt conditions applied, her decision was that the claimant could not be treated as incapable of work from and including 7 March 2000. She went on to supersede the earlier decision awarding the claimant Incapacity Benefit on the grounds that he was no longer incapable of work. As a result, the claimant ceased to be entitled to Incapacity Benefit from and including 7 March 2000.

5. The claimant appealed, referring, among other matters, to the fact that he had osteoarthritis in both knees and his spine and that he had been told that he would need surgery on his left knee. On 11 April 2000, the decision of 7 March 2000, was reconsidered but was not changed. The claimant's appeal then proceeded to a hearing on 24 May 2000, before the Appeal Tribunal. This was a two member Tribunal comprising of a legally qualified Chairman and a doctor. The members of the Tribunal accepted the decision maker's award of 3 points in respect of the claimant's difficulties with stairs and they awarded him a further 9 points. This took his total to 12 points which is not enough to satisfy the test. His appeal was, therefore, dismissed.

6. The claimant then applied to the Chairman for leave to appeal to a Commissioner. Since the grounds of appeal relied on by Mr Stockman at the hearing before us were not identical to those originally advanced, we shall not set the latter out. It is sufficient to say that the Chairman refused leave and the claimant renewed his application before a Commissioner. On 4 April 2001, Mrs Commissioner Brown granted leave and explained that she did so for the following reasons: -

> "Leave is granted as it appears to me that an arguable issue arises as to whether or not the claimant's request to the Tribunal to view his knee was a request for it to carry out a medical examination. Parties are of course free to make submissions on other grounds."

To appreciate the point which Mrs Commissioner Brown was making, it is necessary to look at what happened in the course of the All Work Test assessment.

7. The claimant, when completing the incapacity for work questionnaire, made a number of references to the problems which he experienced with his knees. The Examining Medical Practitioner who examined him on 7 January 2000, made specific comments about the claimant's knees beginning with the words "Knees no swelling". When the appeal came before the Appeal Tribunal, the claimant asked the members to look at his knee. We assume this to be his left knee, which appears to give him particular

difficulty and which has been operated upon in the past. The Record of Proceedings begins by setting out the following exchange: -

> "Representative Doctor said, (Medical Officer) no obvious swelling knee obviously swollen.
>
> Claimant I was with doctor and he says to show your knee.
>
> (Tribunal explained not appropriate for panel to examine claimant)."

In setting out the reasons for their decision, the Appeal Tribunal said this: -

> "... The claimant wanted to show us his knee. We declined as it is not appropriate to carry out a physical examination at an Incapacity Benefit appeal hearing. ..."

We assume, and the appeal has certainly proceeded on the basis that by referring to "a physical examination" the Appeal Tribunal refused to look at the claimant's knee because they considered that they were prohibited from doing so by Article 20(3) of the Social Security (Northern Ireland) Order 1998 (SI 1998/1506 NI 10)).

8. We propose dealing with this aspect of the appeal first, and begin by setting out the wording of Article 20. We set out the whole of the Article although our concern is primarily with Article 20(3): -

> **"Medical examination required by appeal tribunal**
>
> 20-(1) This Article applies where an appeal has been brought under Article 13 against a decision on a claim for a relevant benefit, or as to a person's entitlement to such a benefit.
>
> (2) An eligible person may, if prescribed conditions are satisfied, refer the person -
>
> (a) in respect of whom a claim is made; or
> (b) whose entitlement is at issue,
>
> to a medical practitioner for such examination and report as appears to the eligible person to be necessary for the purpose of providing an appeal tribunal with information for use in determining the appeal.
>
> In this paragraph "eligible person" means a person who is eligible to be appointed as the sole member of an appeal tribunal, or to be nominated as the chairman of such a tribunal.
>
> (3) At a hearing before an appeal tribunal, except in prescribed cases or circumstances, the tribunal –
>
> (a) may not carry out a physical examination of the person mentioned in paragraph (2); and

(b) may not require that person to undergo any physical test for the purpose of determining whether he satisfies the condition mentioned in section 73(1)(a) of the Contributions and Benefits Act."

9. It is common ground that paragraph (3) of article 20 applies in the present case. (See regulation 52 of the Social Security and Child Support (Decisions and Appeals) Regulations (Northern Ireland) 1999.)

10. The question can be recast as follows. Were the members of the Appeal Tribunal right to refuse to look at the claimant's knee because otherwise they would infringe the prohibition in Article 20(3) or were they rejecting an item of evidence as to the state of his knee to which the claimant wished to draw attention? Mr Stockman submitted that it was the latter and that the Appeal Tribunal should have looked at the proffered knee or else it should have adjourned to enable the claimant to obtain a medical report or photographs of his knee. What it should not have done, Mr Stockman submits, was to proceed with the hearing without either looking at the knee or else giving the claimant the chance to put in alternative evidence about its state. He went on to submit that its failure to adopt either of these courses was a breach of natural justice amounting to an error of law.

11. It appears to us that the point is one of general importance. In this jurisdiction many claimants are disabled in one way or another. Many of their disabilities will be readily apparent. For example, a right-handed man may be missing three fingers from his right hand. Another claimant may have had an arm or a leg amputated. Surprisingly, such matters are not always recorded in the medical evidence. If a claimant wishes to hold up his right hand so that the members of a Tribunal can see the extent of the damage to his fingers, are the members of a Tribunal prohibited from looking? In that particular case, it is unlikely that they will not have ample opportunities to observe the situation for themselves if the hearing lasts for any time. Other disabilities will not be so immediately apparent. Someone who, in the past, has suffered very severe injuries to his upper right arm might well wish to draw such injuries to the attention of a Tribunal. This might involve his taking off his jacket and rolling up his right sleeve. A one legged man might have to pull up his trouser leg to demonstrate the artificiality of the relevant limb. Someone with an eye patch might have to lift the patch to show the absence of an eye. Are such offers, and others, to be refused on the grounds that to do so would involve the relevant Tribunal in carrying out a physical examination?

12. The practical consequences are considerable. It would be absurd for a Tribunal to say that there was no, or insufficient, evidence before them that, say, a claimant had lost part of his upper arm when he had offered to roll up his sleeve and show the members the extent of his disability but that offer had been refused. In the present case, the Examining Medical Officer had reported that he found no swelling. The claimant wished to demonstrate that his knee did indeed swell and that he was telling the truth when he said that it did. Claimants will usually be unfamiliar with the 1998 Order and will, therefore, feel confused and angry when what seems to them to be a perfectly sensible request to a Tribunal to look at a disability is refused. Such a refusal will often create a sense of injustice. Of course, problems could arise where a claimant wishes to remove a large amount of clothing or wishes members to inspect a particularly unpleasant wound or stump. We shall return to this aspect below but first

we must decide whether looking at a swollen knee, missing fingers, the absence of an eye or whatever amounts to carrying out a physical examination.

13. Before turning to Article 20(3) itself, we wish to deal with one point. In paragraphs 21 to 24 of decision *R 4/99 (IB)*, Mrs Commissioner Brown held that a Tribunal, like any other adjudicating body, is entitled to use all its senses in assessing the evidence before it and may take account of what it sees as well as hears. She referred to decision *CDLA/021/1994* (now reported as *R(DLA)1/95)*, in which a Great Britain Commissioner, Mr Commissioner Skinner, said: -

> "... The tribunal are precluded from conducting a walking test or making a medical examination of the claimant. However, it does not appear to me that the tribunal's ocular observation of the claimant can be said to amount to a physical examination nor can it be said that the claimant has been required to undergo any physical test. It does not seem to me that the tribunal [*which took into account observations made by the members during the hearing*] were in breach of the prohibition contained in the section. I have considered whether the reliance by the members of the tribunal on their own observation of the claimant may be objectionable on other grounds. It seems to me that a tribunal are entitled to have regard to what they see provided that the weight to be attached is considered carefully. ..."

We agree with those views. In the context of a Tribunal hearing, sight is one of the more important senses. Observing the manner in which a witness gives his or her evidence and how he or she behaves or responds at other times is an important part of the process. Witness A may be wholly convincing while everyone who listens to and observes witness B soon becomes certain that he or she is lying. A Tribunal must, of course, consider its observations carefully and judiciously. The neatly dressed man who has said he is unable to look after himself may be lying. On the other hand, the Tribunal may be seeing the results of extensive efforts by his family or friends to tidy him up for the hearing. Further, a Tribunal which is going to base its decision, or an important part of its decision, on what it has seen should usually put its observations to the claimant and thereby give him an opportunity to comment. It will then be for the Tribunal to accept or reject the comments. Whether or not this is necessary will depend in a large measure on whether the Tribunal's observations raise a new issue or constitute fresh evidence or whether they merely confirm existing evidence.

14. To turn to our own decision, we begin with some preliminary comments on Article 20(3) itself. First, the heading is "Medical examination required by appeal tribunal". Further, Article 20(2) speaks of referring a person to a medical practitioner for such examination and report as appears to the eligible person to be necessary for the purpose of providing an Appeal Tribunal with information for use in determining the appeal. Article 20(3), however, refers to "a physical examination" and "any physical test". We think "a physical examination" is wider than "a medical examination" but considers that the words "may not carry out a physical examination" of an appellant, suggests some formal process beyond mere observing.

15. We have looked at the definitions of "physical" and "examination" in Collins English Dictionary and Thesaurus. A number of meanings are given for "physical" of which the most apposite are as follows: -

1. of or relating to the body, as distinguished from the mind or spirit.

...

2. involving or requiring bodily contact; rugby is a physical sport.

...

6. perceptible to the senses; apparent; a physical manifestation.

Similarly, a number of meanings are given for "examination": -

1. The act of examining or state of being examined.

2. Education. a. written exercise, oral questions etc., set to test a candidate's knowledge and skill. b. (as modifier): an examination paper.

3. Med. a. physical inspection of a patient. b. laboratory study of secretory or excretory products, tissue samples etc.

4. Law. The formal interrogation of a person on oath. ...

The Thesaurus includes the following entry for the word "examination": -

> "... analysis, assay, catechism, checkup, exploration, enquiry, inquisition, inspection, interrogation, investigation, observation, perusal, probe, questioning, quiz, recce (sl), research, review, scrutiny, search, study, survey, test, trial."

16. Mr Stockman submitted that we would be wrong to concentrate on the words "physical" and "examination" separately. They should be read together. We accept that submission and take it a stage further. The relevant words in Article 20(3) state that a Tribunal may not "carry out a physical examination" of an appellant. In our judgment, what is envisaged is some sort of process which, while perhaps falling well short of the conventional and familiar medical examination, nevertheless requires an appellant to submit his body, or more likely some part of it, to investigation. Such a process is formal in the sense that it is initiated by the investigating body and requires the examinee to submit to whatever reasonable investigations the examiner wishes to make. Mr Stockman submitted, and we accept, that one of the elements of an "examination" is that the examinee submits to the appropriate dictates of the examiner. A candidate sitting a written examination must answer the questions on the paper which has been set within the permitted time and in accordance with instructions. He is not free to answer a completely different set of questions. Someone undergoing a driving test must turn right or left as directed and stop, start, perform an emergency stop and other manoeuvres when told to do so. Someone undergoing a conventional medical examination must allow his blood pressure to be taken, his pulse checked and other investigations to be performed. He may even be required to provide samples of blood or urine.

17. When this is understood, it becomes clear that there is a significant difference between carrying out a physical examination, which we accept is absolutely prohibited even if claimant requests it, and merely looking at some part of a claimant's body. If it were perfectly clear to any observer that a claimant lacks an arm or a leg or an eye, it would be absurd for a Tribunal to ignore that obvious fact. Other disabilities or medical problems will not be so readily apparent because they will be covered up by clothing. If a claimant offers to remove some part of his clothing in order to show an injury, wasting, swelling or whatever, we do not consider that a Tribunal is prohibited from looking at whatever it is that the claimant wishes to show them.

18. Indeed, we go further. If the request is a reasonable one, a Tribunal should usually either accede to it or give the claimant an opportunity to obtain alternative evidence. This could be in the form of a medical report or photographs or some other relevant form. It may be appropriate to adjourn for alternative evidence where a claimant wishes a Tribunal to look at some intimate part of his body, or at a serious wound or badly healed stump or where it is otherwise inappropriate to agree to his request. In saying this, we assume that such evidence is not already before the Tribunal. In many cases a Tribunal will already be in possession of a great deal of medical and other evidence and the members may legitimately take the view that this is sufficient. The onus will then be on the claimant to convince the Tribunal that such evidence is deficient in some way.

19. We wish to stress that there is a considerable and significant difference between a claimant requesting a Tribunal to look at some part of his body and the Tribunal itself making the request. In our view it is perfectly legitimate for a Tribunal to observe and take account of what is obvious to every one. If it were clear to everyone that a man lacks three fingers on one hand, it would be wrong for a Tribunal to ignore that fact if it is relevant to what the Tribunal has to decide. We also see nothing wrong, in a simple case, in a Tribunal asking for a better look, particularly where the disability has been referred to and such a look is likely to assist the claimant's case. Why should the man with the missing fingers not be asked to hold up his hand particularly if he is placing emphasis on the loss of some of his fingers? However, if the man wore a prosthesis which concealed the extent of his disability, or wore a glove, could a Tribunal ask him to remove the prosthesis or glove so that they could have a good look at his disability? In our view it would not be appropriate for such a request to come from the Tribunal. If such a request does not actually fall within the regulatory prohibition, it comes close to doing so. There is also the practical difficulty that a prosthesis may be difficult to remove or claimant may be embarrassed by its removal. In practice, the simple removal of a glove or the turning up of a sleeve may not cause many problems. Most claimants want their appeals to succeed and will probably offer to remove the glove, or whatever, once it becomes apparent that it is in their interest to do so. Most of those who do not offer are likely to resist a request in whatever form it is put to them.

20. What we think is not permissible is for a Tribunal to ask a claimant to expose some part of the body which is covered by clothing. A direct request is not permissible and nor is an indirect one which puts a claimant in the position of having to say "yes" or "no". If a Tribunal considers that it does not have enough evidence to decide some issue, it should adjourn so that the claimant can undergo a proper examination by a doctor

21. We also consider that a Tribunal can observe, including comparing one limb with another if the claimant suggests this, but may not go further. One of Mr Toner's arguments against the view that we take is that the members of a Tribunal – and particularly a medical member – may be tempted to go further. Indeed a claimant may ask them to do so. They may be asked to take a closer look and then to feel a lump of swelling or to manipulate a limb. He submitted that it would be particularly hard for a medical member to resist the temptation. We see the point but do not feel that resisting such temptation is beyond the powers of, even medical, Tribunal members.

22. A Tribunal will normally be considering matters down to the date of the decision which forms the subject matter of that appeal. The Tribunal must, therefore, be satisfied that whatever it is that claimant wishes it to see is relevant to that exercise. A Tribunal will, therefore, have to consider the reasons why a claimant wants it to look at something and whether the present condition of what it is being asked to look at relates back to the date of the decision.

23. We come back to the facts of the present appeal. The request to look at his knee came from the claimant and related to the report of the Examining Medical Practitioner. In our view, it would have been legitimate for the appeal Tribunal to have complied with that request provided that the members restricted themselves to looking and did not go further though it may of course ask questions on what it has observed. Indeed, we take the view that if the claimant had offered the Appeal Tribunal the opportunity to compare one knee with the other – something which he did not in fact do because of the Appeal Tribunal's refusal to look at the proffered knee – the members of the Appeal Tribunal could have legitimately availed themselves of that opportunity. The matter was important to the claimant and they should have either accepted his offer or given him the opportunity to obtain other evidence about his knee. They did not, however, consider doing so but proceeded with the hearing. That, in our view, was a breach of natural justice amounting to an error of law. For this reason we allow the appeal.

24. Mr Stockman raised two further grounds of appeal. Since we are allowing the appeal in any event it is unnecessary for us to examine these in any depth. His submissions were, however, carefully crafted and we shall therefore comment briefly. First, in relation to the descriptor, rising from sitting he submitted that the Appeal Tribunal failed to explain adequately why it decided that the claimant sometimes cannot rise from sitting to standing without holding on to something – that is, descriptor 5(c) which carries 3 points. Further, it failed to explain why it rejected the claimant's own evidence that he cannot rise from sitting to standing – which would have earned him 7 points. He pointed out that the Examining Medical Officer appears to have taken the view that the claimant had no problem with rising from standing and asked how the members of the Appeal Tribunal had arrived at their decision.

25. We accept that the Appeal Tribunal did not, in express terms, state that it rejected the claimant's evidence that he cannot rise from sitting to standing. We do not, however, accept that its reasoning is inadequate. The Appeal Tribunal analysed the evidence, medical and otherwise, in some detail. It is clear from that analysis that it considered that the claimant did have a problem but that it was not as serious as he said. It considered that he sometimes had a problem. That was a view which it was entitled to

reach on the basis of the whole of the evidence before it. We consider it has explained itself fully.

26. Mr Stockman raised a further point in relation to this descriptor. As we understand him, he submitted that whilst a claimant might not have an absolute need to hold on to something when rising from sitting, he might have a genuine fear of damaging his knee such that it would be reasonable for him to hold onto something in order to protect his knee. We reject this submission. Either a claimant can rise without holding on to something or he cannot. We take "cannot" to include situations where it would be unreasonable or impermissible for him to rise without holding on. The reasons for the need can be various. It may be that it is impossible for him to rise without assistance or it may be that if he does not hold on to something he will experience significant pain. Other reasons might be that he has received medical advice that he should always hold onto something in order to avoid problems in the future. That would be just as much a need as more absolute ones. The question is - is a claimant unable to rise without holding on to something? – a matter which will depend on the accepted evidence – rather than - is it reasonable for him to do so?

27. Mr Stockman's second ground related to the walking descriptor. The claimant's evidence was that he could not walk more than 50 metres without stopping or severe discomfort. His evidence at the hearing was that he could not walk more than 40 to 50 metres. The Appeal Tribunal decided that the relevant distance was 400 metres and awarded him 3 points on that basis. The claimant had been in receipt of the higher rate of the mobility component. The decision that he was not incapable of work caused the Department to look again at that award. At the time of the hearing before the Appeal Tribunal, the investigations in to whether or not the claimant should continue to receive the higher rate of the mobility component were in progress but were not complete. Those investigations were being carried on by a different branch of the Department. Some time after the hearing the claimant learnt that, although evidence in relation to the mobility component was still being gathered, at the time of the hearing those investigating the mobility component were in possession of a questionnaire which his general practitioner had answered. We have not seen the questionnaire but we were told that, in response to a question about how far the claimant could walk, his general practitioner expressed the view that he could walk 200 metres.

28. So far as the All Work Test is concerned, a person who cannot walk more than 200 metres without stopping or severe discomfort scores 7 points. Mr Stockman submitted that if the general practitioner's answers to the questionnaire had been before the Appeal Tribunal it might have affected its views on how far the claimant could walk. He accepted that the questionnaire was in the hands of a different branch and that that branch dealt with conditions of entitlement which were very different from those applying to the All Work Test. He also accepted that the investigations being conducted by that branch were not complete. Nevertheless, he submitted that the questionnaire, together with the answers to it, should have been placed before the Appeal Tribunal and that the failure to do so was a breach of natural justice, although not one for which the members of the Appeal Tribunal were responsible.

29. We reject those submissions. We say nothing, one way or another, about the case where a person in one branch of the Department appreciates the significance of a piece of evidence and sends it to another branch. There is not, however, in our view, any universal duty or rule that all the evidence relating to benefit A and in the possession of that benefit branch must be forwarded to the branch dealing with benefit B. That would be the outcome of Mr Stockman's submission. The law imposes no such duty. Technology may change matters but, at the present time, the imposition of such a duty could cause considerable delay and resulting hardship. Different benefits are awarded on different grounds and it is settled law that the different adjudication authorities are entitled to take different views of the same piece of evidence. More fundamentally, if a claimant wishes to produce evidence in support of his appeal he should do so. He is not entitled to rely on the decision maker seeking out and producing evidence in relation to a different benefit though he may, of course, seek out the evidence himself. In normal circumstances, evidence in relation to a claim for one benefit does not have to be produced, although it may be, in relation to another benefit. The decision maker has to produce evidence which he has in his possession or which he used in reaching his decision. He does not, as a general rule, have to produce evidence which he does not possess and which has not been used by him to make the decision under appeal.

30. For the reasons given in relation to the refusal of the Appeal Tribunal to look at his knee, we allow the appeal and remit the matter to the new Tribunal for rehearing.

(Signed):

JOHN A H MARTIN QC
CHIEF COMMISSIONER

(Signed):

MOYA F BROWN
COMMISSIONER

(Signed):

J P POWELL
DEPUTY COMMISSIONER

(Dated): **22 JUNE 2001**

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