CI/606/1993

Tameside Metropolitan Borough

Chief Executive's Department

ASHTON-UNDER-LYNE · AUDENSHAW · DENTON · DROYLSDEN · DUKINFIELD · HYDE · LONGDENDALE · MOSSLEY · STALYBRIDGE

Council Offices, Wellington Road
Ashton-under-Lyne, Tameside OL6 6DL
Telephone 061 342 8355 Minicom 061 342 3170
Telex 669991 Fax 061 342 3115/3070

Chief Executive **Michael J Greenwood**
Borough Solicitor **Ian M Kennaway**
Borough Personnel Officer **Colin E J Fielding**

Your ref
Our ref
Ask for Paddy
Extension 3068
Date 13/07/94

Rec'd 18/7/94

"Commissioners' Decisions"
Child Poverty Action Group
Bath Street
1-5 LONDON
EC1V 9PY

Dear Sir/Madam,

Enclosed is a copy of starred decision CI/606/1993. You may find this decision worthy of publication as I feel that it highlights a little used argument in claims to Industrial Injuries Disablement Benefit. Should you wish to contact me further about this, please feel free to ring me on 061.342.3068.

Yours faithfully,

Patrick J. Hill (Mr.)
Welfare Rights Officer

POSITIVE ABOUT DISABLED PEOPLE

Disablement Benefit — 'Commencement' & 'Onset'

62/94

MR/SH/2

Commissioner's File: CI/606/1993

DSS File:

SOCIAL SECURITY ACTS 1975 TO 1990

SOCIAL SECURITY ADMINISTRATION ACT 1992

APPEAL FROM DECISION OF MEDICAL APPEAL TRIBUNAL ON A QUESTION OF LAW

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Name:

Medical Appeal Tribunal: Manchester

Original Decision Case No: 62709015

1. The claimant's appeal is allowed. The decision of the Manchester medical appeal tribunal dated 14 May 1993 is erroneous in point of law. I set that decision aside and refer the case to a differently constituted tribunal for determination.

2. The claimant was born without a right forearm, wrist or hand and she wears a cosmetic prosthesis. Nevertheless, she managed to obtain work in a warehouse. On 24 August 1992 she was taking a carton from a shelf but underestimated its weight and injured her left hand. She claimed disablement benefit.

3. An adjudicating medical authority found that the claimant had suffered a ligamentous strain of her left wrist resulting in a loss of faculty which he identified as painful impaired movements of her left wrist. In Parts V to VII of form BI 118(Accident), the instructions given to the adjudicating medical authority and his answers were as follows:-

"Part V: - Disabilities (numbered serially)

5. (a) Specify the disability which results from the relevant loss of faculty stated at 4(c). If the disability results solely from the relevant loss of faculty, mark 'F'. If there is another effective cause, mark 'P'.

Serial No	Description of Disability	F or P
1	Impaired Dexterity	F

(b) If 'P' is entered at 5(a) above specify which condition, having regard to the clinical findings at Part III 3(a) and other evidence at Part III 3(b), is the other effective cause. Conditions which pre-existed the accident should be marked 'O(Pre)'. Those arising after the accident should be marked 'O(Post)'.

Serial No	Defect, injury or disease constituting the other effective cause	O(Pre) or O(Post)

(c) Any condition listed at Part III which, through interaction, has the effect of increasing the disability arising from the relevant loss of faculty (shown at 5(a)), but which is not itself the other effective cause of that disability, should be specified and marked 'C'.

Serial No	Defect, injury or disease giving rise to greater disablement	C
1	Artificial Right hand and Forearm	C

(d) **Unconnected injuries, diseases etc.**

Enter below all other abnormalities described in Part III which have no effect upon the disablement resulting from the disability marked 'F' or 'P' at 5(a).

.....

Part VI: - Disablement - effect of relevant loss of faculty

6. Describe the way in which the disability shown at 5(a) above, as affected by those conditions shown at 5(b) and 5(c) handicap the claimant in the ordinary activities of life (eg. walking, gripping, bending, etc).

Impaired Grip

Part VII: Calculation of assessment (Serial numbers to correspond with those shown in Part V). Entries under "Gross assessment" and "Offset" are required only where an O(Pre) condition has been identified at Part V, item 5(b).

Disabilities shown in Part V. Item 5(a)

7. Entries under "Gross assessment" and "Offset" required only where an O(Pre) condition has been identified at Part V, item 5(b).

Any O(Pre) condition should be offset only to the extent to which disablement would have resulted from it during the period under consideration even if the accident had not occurred. The residual net assessment will therefore include any addition for the resultant greater disablement, and no addition should be made at box 8 below.

Any disablement arising from the presence of an O(Post) condition should be entirely ignored. Assess only the disablement appropriate for the accident had the O(Post) condition not occurred. The assessment should be recorded only as net at box 7.

Serial No	Offset (give percentage and condition)	Net assessment
1		7%

8. Any 'C' condition (Part V, item 5(c) should not itself be assessed. Any interaction between the 'C' condition and the 'F' or 'P' disability which has the effect of increasing disablement during the period under consideration should be considered. This element of 'greater disablement' should be quantified and an appropriate assessment entered at box 8.

Any O(Pre) condition requires no further action. No addition should be made at box 8.

Any O(Post) condition: no addition should be made if the total net assessment (boxes 7 and 8) is less than 11%. If the total net assessment is 11% or more, assess the extent at which the 'P' disability is worsened by the presence, during the period, of the O(Post) condition. Enter the appropriate additional assessment for this worsening at box 8. No addition should be made for the O(Post) condition itself.

Serial No	Additional assessment
1	70%

The adjudicating medical authority therefore assessed the disablement resulting from the relevant loss of faculty at 77 per cent and that assessment was made in respect of the period from 6 December 1992 to 5 February 1993. It was a final assessment.

4. The Secretary of State asked the adjudication officer to refer the case to a tribunal and made the following submission:-

"It is submitted on behalf of the Secretary of State that the adjudicating medical authority has incorrectly

described impaired dexterity as a fully relevant condition since it is submitted that the artificial right hand and forearm constitute a pre-existing other effective cause of disablement and the adjudicating medical authority should have made an offset in respect of this disability from a gross assessment in respect of the overall disablement."

The claimant's representative, Mr P J Hill of Tameside Metropolitan Borough Council Welfare Rights Service, did not dispute that an "offset" might be appropriate but he argued that the gross assessment, or even the net assessment, could be over 100%.

5. The chairman of the tribunal recorded a lengthy statement of evidence from the claimant in which she claimed considerable pain and gave some explanation of what she could do before the accident but could not do any more. She had gone back to work but on a lighter job and she had had to have some time off. The medical members of the tribunal examined the claimant and studied the X-rays and recorded the following findings:-

"On examination

L wrist lacks about 50 per cent dorsiflexion but other movements are full and painless.

There is local tenderness over the scaphoid.

Grip is below par and sensation is inconsistently impaired.

Neck movements are full with complaints of discomfort on the L.

She has cosmetic R artificial arm.

X-rays taken on day of accident.

Show normal appearances in wrist with no bony damage and no soft tissue damage."

[I have taken those findings from the manuscript original. The typed version is very different.] The tribunal found that there was a loss of faculty, identified as "impaired dexterity", resulting in the disablement from the relevant accident. Their decision was as follows:-

"The decision of the AMA is not confirmed.

The extent of the disablement resulting from the loss of faculty is to be assessed at 10 per cent after offsetting 70 per cent for (R) congenital amputation [sic] of arm [and] after adding 5 per cent for greater disablement due to the interaction of industrial injury and congenital amputation above, for the period 6.12.1992 to 5.12.1993.

This is a final assessment."

They gave the following reasons for their decision:-

> "Having read the scheduled evidence and the letter from Debra Hitchen, Senior Physiotherapist dated 13.5.93 and the written submission provided by Mr Hill on her behalf, having heard the oral evidence and the oral submission of Mr Ashton and Mr Hill we were of the view that:-
>
> > [The claimant] suffered a sprain of (L) wrist with pain radiating from the wrist to the neck and the symptoms continue
> >
> > We would have assessed this injury in isolation at 5% but due to the interaction with the congenital amputation which we assess at 70 per cent, we gauged the total disability at 80 per cent."

6. The claimant now appeals with the leave of the tribunal chairman on the ground that the tribunal "have not given enough importance to the 'connecting factor'". The "connecting factor" - or, as it is more usually known, the "connection factor" - is a concept that has been recognised since the earliest days of the industrial injuries scheme, although there is no express reference to it in the legislation. It takes account of the fact that, where a person suffers from two disabling conditions which might if assessed separately give rise to assessments of x per cent and y per cent, the overall disablement of the claimant may be greater than (x + y) per cent due to the interaction of the two disabling conditions. In the present case, the adjudicating medical authority seems on the face of his decision to have considered that the "connection factor" was 70 per cent whereas the medical appeal tribunal considered that it was only 5 per cent.

7. I was at first somewhat surprised at the grounds of the reference to the medical appeal tribunal. The "C" condition as defined on form BI 118(Accident) at Part V, item 5(c) was designed to take account of the "connection factor" and the adjudicating medical authority was only following the instructions in not assessing it at box 7 (where "offsets" are considered) but dealing with it as an addition at box 8. Form BI 118(Accident) treats the "C" condition as something entirely separate from an "O(Pre)" or "O(Post)" condition. However, in CI/081/90, the Commissioner held that approach to be wrong.

8. The relevant legislation is now to be found in regulation 11 of the Social Security (Industrial Injuries) (General Benefit) Regulations 1982 of which paragraphs (2) to (5) provided, at the material time:-

> " (2) When the extent of disablement is being assessed for the purposes of section 57 [of the Social Security Act 1975 - now section 103 of the Social Security Contributions and Benefits Act 1992], any disabilities which, though

resulting from the relevant loss of faculty, also result, or without the relevant accident might have been expected to result, from a cause other than the relevant accident (hereafter in this regulation referred to as "the other effective cause") shall only be taken into account subject to and in accordance with the following provisions of this regulation.

(3) An assessment of the extent of disablement made by reference to any disability to which paragraph (2) applies, in a case where the other effective cause is a congenital defect or is an injury or disease received or contracted before the relevant accident, shall take account of all such disablement except to the extent to which the claimant would have been subject thereto during the period taken into account by the assessment if the relevant accident had not occurred.

(4) Any assessment of the extent of disablement made by reference to any disability to which paragraph (2) applies, in a case where the other effective cause is an injury or disease received or contracted after and not directly attributable to the relevant accident, shall take account of all such disablement to the extent to which the claimant would have been subject thereto during the period taken into account by the assessment if that other effective cause had not arisen and where, in any such case, the extent of a disablement would be assessed at not less than 11 per cent if that other effective cause had not arisen, the assessment shall also take account of any disablement to which the claimant may be subject as a result of that other effective cause except to the extent at which he would have been subject thereto if the relevant accident had not occurred.

(5) Any disablement to the extent to which the claimant is subject thereto as a result both of an accident and a disease or two or more accidents or diseases (as the case may be), being accidents arising out and in the course of, or diseases due to the nature of, employed earners' employment, shall only be taken into account in assessing the extent of disablement resulting from one such accident or disease being the one which occurred or developed last in point of time."

Form BI 118(Accident) is intended to assist adjudicating medical authorities to apply regulation 11. "O(Pre)" conditions are "other effective causes" to be considered under regulation 11(3) and "O(Post)" conditions are "other effective causes" to be considered under regulation 11(4). The form appears to be defective in that it makes no provision for cases which fall to be considered under regulation 11(5) but that issue does not arise here.

9. In CI/081/90 it was submitted on behalf of the Secretary of State that the "C" condition was justified by what is now paragraph (1)(a) of the Schedule 6 to the Social Security Contributions and Benefits Act 1992. The Commissioner rejected that submission and I respectfully agree with the Commissioner. All cases where there is a "connection factor" are cases where there is either an "O(Pre)" or "O(Post)" condition and must be assessed under regulation 11 (see R(I) 3/91). It is simply not possible to conceive of a case where there is disability due to the interaction between a relevant loss of faculty and another condition where that other condition is not an "other effective cause" within regulation 11(2). It is the very nature of the "connection factor" that it is due to two or more effective causes. In Regina v. Industrial Injuries Commissioner, Ex parte Cable [1968] 1 QB 729, (also reported as an Appendix to R(I) 11/66) the Court of Appeal had to consider the "connection factor" where the claimant had lost his left eye in an industrial accident and had subsequently lost most of the sight in his right eye due to a non-industrial disease. Regulation 2(3)(a) of the National Insurance (Industrial Injuries) (Benefit) Regulations 1964 provided:-

> "Where as a result of the relevant accident the claimant has suffered an injury specified in the said Schedule 2, but -
>
> (a) As a result of that injury the claimant may be expected, having regard to his physical and mental condition at the date of the assessment in respect thereof, to be subject to greater disabilities than would normally be incurred as a result of such an injury; or
>
> (b) ....;
>
> the loss of faculty suffered by the claimant as a result of such injury shall be assessed by reference to the degree of disablement set against such injury in column 2 of the said Schedule 2 subject to such adjustment as may be reasonable in the circumstances of the case."

Lord Denning MR said:-

> "Applying that regulation 2(3)(a), it seems to me that at the date of assessment (August 21, 1964) the claimant was subject to greater disabilities than would normally be incurred as a result of the loss of an eye. He was at that date nearly blind. That would not normally be the result of losing one eye. But was his blindness "a result of that injury"? I think it was. His blindness was the result of two causes: (i) the loss of the left eye; (ii) the disease in the right eye. If only one of those causes had taken place, he would be able to see well with one eye. But the two causes combined to make him nearly blind. When two causes co-operate to produce a disability, it is a result of each and both of those causes: see the illustrations I

gave (under heads 2 and 3) in Minister of Pensions v. Channell [1947] 1 KB 250, 254, 255. Put quite simply, it is this: as a result of losing his left eye, he is now nearly blind whereas he would not otherwise have been; for, although he has a defective right eye, he could, apart from the accident, have seen well with his left eye."

10. If there is no "C" condition independent of "O(Pre)" and "O(Post)" conditions, the Secretary of State was right to submit that the adjudicating medical authority ought to have applied an "offset". This was clearly a case where there was an "O(Pre)" condition. "Offset" is another convenient concept not expressly mentioned in the legislation. It is a useful concept because, in applying what is now regulation 11(3) of the 1982 Regulations, an adjudicating medical authority should expressly make findings as to the extent of the total current disablement arising from the relevant causes, the extent of the disablement from which the claimant would have suffered had the relevant accident not occurred (the "offset") and the net assessment. In R(I) 2/74, the Chief Commissioner in R(I) 2/74 at paragraph 26.

> "Although it may be unnecessary for me to express a definite conclusion on this, I think that there is great force in counsel's contention that where an offset is made all three figures should be recorded. (The version of form BI118A referred to above provides for this.) If the claimant is to be in a position to exercise effectively his right of appeal to the Commissioner or his right to get the assessment reviewed, I think that he is entitled to be told whether the 3 per cent is 20 minus 17 per cent or 10 minus 7 per cent or what; and that this is so whether or not the gross figure is fixed by law under regulation 2(6) and Schedule 2 [of the 1964 Regulations as substituted in 1970]."

The need to record all three figures (or, at any rate, two of them as the third can then readily be deduced) thus arises not from any express requirement to be found in regulation 11 of the 1982 Regulations but from the requirement that a medical appeal tribunal record their decision in a way which adequately explains their reasoning, imposed by regulation 31(4) of the Social Security (Adjudication) Regulations 1986 . A claimant ought to know what proportion of his current disablement is being attributed to the relevant accident.

11. Not all cases falling under regulation 11(3) involve a "connection factor". Where one does arise, that part of the assessment of disablement arising from it ought to be separately identified. Again, that is necessary for the proper explanation of the tribunal's reasoning and in Murrell v. Secretary of State for Social Services (reported as an Appendix to R(I) 3/84) both Sir John Donaldson MR and Dunn LJ encouraged such identification.

12. This case illustrates the value of recording both the "offset" and the "connection factor". It might be thought that there is no great advantage in assessing the disablement arising

from the claimant's lack of a forearm, wrist and hand, only for that sum to be offset. However, whereas (subject to the points made in paragraphs 14 and 17 below) it is perfectly plain how the medical appeal tribunal reached their decision, it is not entirely clear whether the adjudicating medical authority, who did not record an "offset", approached the case correctly and found that the 70 per cent represented the "connection factor" alone or whether he was confused and the 70 per cent represented merely the assessment in respect of the pre-existing disablement, as the Secretary of State seems to have suspected. The Secretary of State may have thought that there was a striking coincidence in the figures because an assessment of 70 per cent in respect of the pre-existing disablement could clearly be explained by reference to item 10 of Schedule 2 to the 1982 Regulations. In this respect, the standard form used by medical appeal tribunals is much better than form BI 118(Accident) used by adjudicating medical authorities.

13. The claimant submits that the medical appeal tribunal gave insufficient weight to the "connection factor". The difference between the 70 per cent apparently found by the adjudicating medical authority and the 5 per cent found by the medical appeal tribunal is substantial but the assessment of disablement was a matter for the tribunal and a Commissioner may interfere only if the assessment is so unreasonable that no tribunal properly instructed as to the law could reasonably make such an assessment (see Murrell).

14. The real problem in the present case is that I am unable to tell whether the tribunal reached such an unreasonable decision because the tribunal have not recorded sufficiently detailed findings of fact. I appreciate that it is difficult to express degrees of loss of power (or of pain) but one way of doing it is by making it clear whether or not statements by the claimant such as "I can no longer lift a full pan" are accepted. The claimant can then see whether the assessment is based on his or her description of his or her disabilities. It is, in any event, important for a tribunal to indicate to a claimant whether or not his or her evidence is accepted. If a full note of evidence is taken, it is not difficult to indicate, by reference to that note, which parts of it are or are not accepted.

15. A further criticism of the findings of fact in this case is that they are related solely to the date of the examination (apart from the observation about the X-rays). A claimant's condition may well have improved between the beginning of the period under consideration (which in this case was 15 weeks after the accident) and the date of a tribunal examination (which in this case was about 38 weeks after the accident). A tribunal should show that they have considered the past period and record findings in respect of it. This is necessary so that the claimant knows whether any greater disability suffered earlier in the period has been taken into account. In R(I) 33/61 it was observed that, while in some cases rough justice can be done by taking the average disability over a long period, in other cases it is necessary, in order to do justice bearing in mind the

financial implications of assessments, to assess disablement more precisely over two or more shorter periods. An assessment of disablement at 15 per cent for six months followed by one at 5 per cent for six months usually entitles a claimant to £484.64 at current rates. An assessment at 10 per cent for 12 months usually entitles a claimant to nothing.

16. The Secretary of State supports the claimant's appeal on two different grounds. Firstly, it is said that the tribunal's decision is "confusing". The suggestion seems to be that the tribunal's decision is inconsistent with their reasoning. I reject that submission. The tribunal's approach has been put in two different ways but there is no inconsistency.

17. The Secretary of State's second submission is as follows:-

> " 9. In his written submission to the MAT the claimant's representative set out how he considered the MAT should assess the extent of the claimant's disablement. In his submission he contended that the claimant's disablement should be assessed at 100 per cent. The MAT have not dealt with this contention in their decision. Whilst they have set out what they consider the appropriate assessment to be, they have not given any reasons to show the claimant or her representative why they rejected the arguments that the claimant's representative put forward both in written and oral evidence to them. In accordance with what the Tribunal of Commissioners said at paragraph 13 of R(I) 18/61, it is submitted that the MAT's decision dated 14 May 1993 should be held to be erroneous in law."

In substance, I agree with that submission although I would put the matter slightly differently. A tribunal's reasoning should make it clear that they have not made an error of law and, where an issue of law is raised, it ought to be clear from the tribunal's reasoning how they decided that issue. In the present case, it is not clear from the tribunal's decision whether they accepted Mr Hill's submission in principle but decided that, in any event, the gross assessment should be 80 per cent, or whether they rejected the submission and thought that the gross assessment could not possibly be as much as, or more than, 100 per cent. That is important because, as a matter of law, Mr Hill's submission was correct and it was possible to defend the adjudicating medical authority's decision on the basis that the gross assessment in this case should have been 147 per cent. There is at least a possibility that the tribunal thought that the gross assessment had to be calculated on the basis that the loss of the use of two hands was to be assessed at 100 per cent under item 1 of Schedule 2 to the 1982 Regulations. The claimant was clearly less disabled than somebody who had completely lost two hands.

18. In R(I) 34/61, the Commissioner explained why a gross assessment should not be limited to 100% in a case such as the

present.

> "An examination of the first six items in the First Schedule to the [National Insurance (Industrial Injuries) (Benefit) Regulations 1948 - see now Schedule 2 to the 1982 Regulations] shows that 100 per cent disablement for the purposes of the Act is by no means the same thing as total disablement. Nor is an injury within one of those six items necessarily as disabling as an injury within another of those items nor (in some cases) a different injury in the same item; see for example the different injuries included in item 3. The amputation in item 17 [now item 18] carries an assessment of 90 per cent and that in item 24 [now item 25] (the one relevant to this case) an assessment of 70 per cent, yet two such amputations carry an assessment of only 100 per cent. Further it unhappily would be possible for a man to sustain an accident of such severity as to result in all the injuries mentioned in five of the first six items in the first schedule. In such a case, if the claimant before the accident had, for example, a defect in one arm and in his eyesight, it would manifestly be unjust to make a gross assessment of 100 per cent and then subtract something for the pre-existing defect. The correct procedure would be to decide what the gross assessment would have been, even in excess of 100 per cent, if the medical board or medical appeal tribunal were allowed to make it, and then make an appropriate adjustment by way of deduction from <u>that</u>. If the remainder were 100 per cent or more (it would not matter how much more) the assessment will be 100 per cent. .... In my judgment an assessment of 100 per cent means that the degree of disablement would have warranted an assessment of 100 per cent or more. Where therefore, as here, the gross assessment before any adjustment would be 100 per cent, but an adjustment is necessary because the case comes within regulation 2(3) [now regulation 11(3)], then it is necessary to go on to consider whether it is 100 per cent because <u>in fact</u> that represents the degree of disablement, or because <u>in law</u> 100 per cent is the maximum assessment that may be made, however great the disablement in fact may be. In short one must adjust the real figure and not the artificial ceiling of 100 per cent."

It may be thought that the loss of the use of two hands is, at the very least, twice as disabling as the loss of the use of one. The "connection factor" in the present case, where the claimant had reduced grip in her one hand, could be very substantial, depending on the extent to which her grip was reduced. An inability to lift moderate weights with one hand may not be particularly significant when the claimant can use the other hand instead, but it is obviously a substantial handicap if the claimant has only the one hand and cannot be provided with a functional artificial limb.

19. I therefore find that the tribunal's decision was erroneous in point of law for want of compliance with the duty imposed by

regulation 31(4) of the Social Security (Adjudication) Regulations 1986 to record a statement of reasons (including findings of fact) for their decision. The case must now be considered by a differently constituted tribunal who must make clear findings of fact, covering the whole period at issue, and explain the reasoning which leads them to their final assessment or assessments of disablement.

(Signed) M. Rowland
Commissioner

(Date) 24 June 1994