Bulletin 174

THE SOCIAL SECURITY COMMISSIONERS

Commissioner's Case No: CSDLA/444/02

SOCIAL SECURITY ACT 1998

APPEAL FROM THE HAMILTON APPEAL TRIBUNAL UPON A QUESTION OF LAW

DEPUTY COMMISSIONER: SIR CRISPIN AGNEW OF LOCHNAW BT QC

ORAL HEARING

Appellant:

Respondent: Secretary of State

Tribunal: Unified Hamilton

Tribunal Case No: U/05/101/2001/02913

DECISION OF DEPUTY SOCIAL SECURITY COMMISSIONER

Decision

1. I hold that the tribunal erred in law, in that the composition of the tribunal was such that an informed bystander would conclude that there was a real possibility that the tribunal was biased. I therefore recall the decision of the tribunal. I remit the appeal to differently constituted tribunal to re-hear the appeal. I direct that the differently constituted tribunal must not include members who have sat with Dr B on any previous occasion. I direct that the new tribunal is not to have a sight of the Decision Notice, Record of Proceedings or the Statement of Reasons from the previous tribunal.

Oral hearing

2. This appeal proceeded by was of an oral hearing on 11 February 2003. The claimant was represented by Ms Shirley McAleer, Welfare Rights Officer assisted by Mrs M Wilson, both from North Lanarkshire Council. Mr J Brodie , Advocate represented the Secretary of State instructed by Miss A Cairns, solicitor to the Secretary of State.

3. I am aware that CSDLA/1019/99 is subject to appeal to the Court of Session and is to be heard in October 2003. I decided to proceed in this case because it raises different issues although there are similarities, and to an extent the law has moved on since that decision, if for no other reason than that the Human Rights Act 1998 now applies.

Background

4. On 11 July 2001 the claimant's application for DLA was refused. It was held that she was not entitled to DLA from and including 6 March 2001.

5. The claimant appealed to the appeal tribunal.

Appeal tribunal

6. On 22 February 2002 the appeal tribunal held a hearing at which Ms McAleer from North Lanarkshire Council represented the claimant. The tribunal refused the appeal and issued a three page Statement of Reasons for Decision.

7. The Tribunal consisted on a chairman, a member and a medical member. The medical member had been an EMP, but not since June 2001. In light of CSDLA/1019/99 the chairman asked the claimant's representative if objection was taken to the medical member, but objection was waived.

8. The tribunal required to consider three medical reports from different EMPs and a Report from the claimant's GP in addition to the evidence given by the claimant herself to the tribunal.

9. This appeal arises from the fact that one of the EMPs [Dr B] also sat regularly as a member of the Hamilton Tribunal. From information provided by the Secretary of State, in the two years prior to this tribunal hearing Dr B had sat as a medical member at 191 sessions. I was told that a session was a morning or an afternoon. He had sat with the chairman on 22

sessions, the member on 14 sessions and with the chairman and the member together on 3 sessions – a total of 39 sessions out of 191. The Secretary of State was unable to provide information on how many of Dr B's Reports were considered by Hamilton tribunals in the same period. The WRO who represented the claimant before me [and at the Hamilton hearing] said that "hundreds" of Reports by Dr B were considered in the area, many of which must have come before the Hamilton tribunal in appeals.

Appeal to the Commissioner

10. The claimant appealed the decision to the commissioner on the grounds that:

> "The tribunal states in their decision that they prefer the evidence of [Dr B] to the other two EMP's .
>
> The tribunal states 'The Tribunal placed most weight on [Dr B's] report. He is experienced in carrying out assessments of functional impairment and is disinterested in the outcome.'
>
> The other two EMP's involved presumably would have had the same training and would also have the same feeling of disinterest in the outcome.
>
> [Dr B] is a Doctor who is an EMP and also a regular Tribunal member in Hamilton.
>
> I would submit that for reasons similar to the [] decision CSDLA/1019/99 that the Tribunal has preferred [Dr B's] evidence to the other two equally qualified Doctors. I do not feel that they have given good enough reasons to justify doing this.
>
> I would submit that there has been a breech of the rules of natural justice."

11. The Secretary of State submitted in response:

> "In the grounds of appeal it is stated by the claimant's representative that:
>
> > 'The Tribunal states in their decision that they prefer the evidence of [Dr B] to the other two EMP's. The Tribunal states ' ...The tribunal placed more weight on [Dr B's] report. He is experienced in carrying out assessments of functional impairment and disinterested in the outcome.
> >
> > The other two EMP's involved presumably would have had the same training and would have the same feeling of disinterest in the outcome ... [Dr B] is a Doctor who is an EMP and also a regular Tribunal member in Hamilton.'
>
> The Commissioner will wish to know that I have checked with the Appeals Service and can confirm that [Dr B] is indeed a regular tribunal member.
>
> In my submission the alleged breach of natural justice [in that [Dr B] was not only an EMP but also a regular tribunal member] was seemingly not raised until the grounds of appeal were formulated. I do not support the claimant in her appeal. The claimant and her representative would have had copies of the appeal bundle before the tribunal hearing took place. It is clear that [Dr B's] report was not favourable to the claimant.

If the claimant wanted to raise an objection to this report and cite the fact that [Dr B] was also a regular Tribunal member, then I submit that this should have been raised during the tribunal hearing.

In terms of providing adequate reasons for its preference it was incumbent on the tribunal to analyse the relevant evidence and give each piece its appropriate weight. These are purely matters for the tribunal and will not involve an error of law provided that there was enough evidence to support the tribunal's findings of fact; the tribunal weighed up the evidence in a rational way and finally, that the tribunal provided adequate reasons as to why one aspect of evidence was preferred as opposed to another. In my submission the tribunal have discharge this duty. In their decision the tribunal qualified their reasons by stating:

> 'He [Dr B] saw the appellant on an average day shortly before the decision was made. She confirmed in writing that the statement he recorded was correct ... There are more average or good days per week than bad. The tribunal accepts the terms of the second report as representative of the appellant's usual condition when the decision appealed against was made.'

Further,

> 'The tribunal found the appellant's description of a severely limited ability to walk and self-care for years to be inconsistent with the bulk of the medical evidence and the lack of specialist input. For example, she told the tribunal that she had been spending 2 to 4 days a week in bed since around 1980 yet [Dr I] and [Dr B] reported no muscle wasting and found little or no functional impairment.'

If the Commissioner accepts my submission that the tribunal have not erred in law, I invite him to dismiss this appeal for leave to appeal."

12. In view of the issues raised I decided to order an oral hearing. I directed:

"One of the grounds of appeal is that Dr B was an Examining Medical Practitioner, who sat regularly as a tribunal member in Hamilton. Accordingly this was not a fair and impartial hearing. Reference is made by the claimant to the Decision of the Commissioners in CSDLA/1019/99. That case held that a tribunal was not impartial where a member of tribunal also acted from time to time as an Examining Medical Practitioner.

In *AA Lawal v Northern Spirit Ltd* (2002) EWCA Civ 327 the Court of Appeal held that no real possibility of bias existed when a part-time judge of the Employment Appeal Tribunal appeared as an advocate before the Tribunal chaired by another judge sitting with two lay members, one or both of whom had previously sat with the part-time judge. The court went on to say the position might be different were advocates asked to sit with such frequency that lay members might be led to look on them as judges who appeared as part-time advocates rather than the reverse.

The present case is the converse of CSDLA/1019/99, but is might be said to raise similar issues. It is not the same as *AA Lawal* because the EMP is an expert witness

and not an advocate and this raises different considerations. *AA Lawal* also raised the issue of the regularity of sitting as an important factor.

The Secretary of State accepts that the Examining Medical Practitioner sits regularly as a member of the tribunal. ...

The parties should be prepared to address the Commissioner at the oral hearing on the issues raised by those two cases in the context of the claimant's ground of appeal.

In his submissions the Secretary of State suggests that the claimant waived her right to object to Dr B. Waiver requires there to be a full knowledge of the facts. I do not know if the claimant knew at the time of the hearing that Dr B sat regularly on the tribunal or if she was asked if she wished to waive an objection on this ground.

The claimant is to provide information on what knowledge her representative had in regard to Dr B's sittings on the tribunal. ...

The parties should have regard to the comments of the Privy Council in *Millar v Dickson* 2001 SLT 988 (PC) on the issue of waiver. Both parties should be prepared to make submissions at the hearing on this question of waiver."

13. In response to my direction the Secretary of State provided the information on the number of sittings referred to above. The claimant's representative responded as follows:

"[The claimant] states that she was aware that she could object to the tribunal member if they were or had been an Examining Medical Practitioner for the Benefits Agency.

Mrs Boyd, Chairman, has referred to the Gillies decision in her notes as [Dr H], tribunal member, had been an Examining Medical Practitioner several years ago. We did not object to [Dr H]. It was not put to ourselves that we could object to the Examining Medical Practitioner's report completed by [Dr B], who still currently sits as a tribunal member."

The oral hearing

Preliminary matters

14. I had read the grounds of appeal as raising issues regarding (i) the adequacy of the statement of reasons and (ii) whether or not there was apparent bias by reason of the relationship between the EMP and the tribunal. I understood that the Secretary of State's counsel had understood them in the same way. It became clear at the hearing that the claimant was in fact alleging actual bias. The appeal was presented in a manner that suggested that only actual bias was in issue. After Mr Brodie had presented his submissions on apparent bias, he indicated that he was concerned as to the basis of the appeal. I tried to clarify the matter with the representative. The answers I got suggested that actual bias was being maintained, but that the claimant would also found on apparent bias. I am not clear that the claimant's representative understood the difference, but I agreed to proceed to consider the appeal on those three grounds.

15. With regard to waiver, the factual situation is far from clear. The grounds of appeal raised the question of natural justice and the effect of CSDLA/1019/99 in the context that Dr B gave one of the Reports and was known to sit as a member of the tribunal. I tried to elicit relevant information from the claimant's representative about her knowledge at the time of the hearing. I understood from the claimant's representative that at the time of the hearing that she knew that Dr B gave Reports in the area, that she knew he sat as a member of the tribunal from time to time. She said that she was content to proceed in the face of that information, but that it was only when the decision came out, which indicated that the tribunal had in fact been biased that a decision was made to appeal. She said that she did not normally object to Dr B, because he was "OK", but in this case there was actual bias from the terms of the decision. She said she did not know that she could object to Dr B's Report because the chairman only asked if there was any objection to the medical member. I gained the impression that she considered that if there was a legal question as to the right to object or to waive an objection that she expected the legal chairman to raise the issue and to give the claimant an opportunity to object or waive her rights as has been done with the medical member. I have to say that explanation does not sit easily with the appeal that came in after the decision, unless the appeal really relates only to the question of actual bias. I find that the claimant and her representative, who is not legally trained, probably did not fully understand the legal issues involved in the relationship between Dr B and the tribunal and did not fully understand the implications of waiver in this situation.

16. I raised with the parties the comments by Mr Commissioner Rice in CDLA/846/95 (*74/96) that the evidence of an examining medical practitioner was both disinterested and informed. The claimant's evidence was not. Accordingly it was self-evident and obvious why a tribunal would prefer the evidence of the EMP to that of the claimant. Moreover the evidence of the EMP was normally to be preferred to that of the claimant's own GP because the latter, unlike the EMP was likely to be subject to pressure from the claimant. Mr Brodie indicated that he was not comfortable in accepting that analysis and reminded me that tribunals are required to have regard to all the evidence and say why they prefer the evidence of one doctor to another. Cases which reflect this known to me, but not mentioned at the hearing, include CSDLA/856/97 (*39/98) and CSDLA/1/95. He did accept that an EMPs Report might be given more weight because it was likely to be structured to the issues involved and it would be known to tribunals that EMPs were give training on these issues.

Submissions for the claimant

17. The submission was to the effect that on reading the tribunal's Statement of Reasons it is clear that the Tribunal was biased, because the tribunal accepted Dr B's Report in preference to that of the other two EMPs, which were favourable to the claimant. The claimant founded on the passage that "the tribunal placed most weight on Dr (B)'s Report. He is experienced in carrying out assessments of functional impairment and disinterested in the outcome." It was said that this applied equally to the other EMPs, but the tribunal had not accorded them this weight. This demonstrated bias. In response to Mr Brodies submission on this issue, I have noted the representative as saying the tribunal "erred in law because of the wording of the decision. The wording of the decision shows actual bias."

18. With regard to waiver it was said that the claimant was aware of CSDLA/1019/99, but did not know she could object to Dr B, because the chairman did not raise the issue. I have outlined in paragraph 14 some of the other information I elicited from the claimant.

Submission for the Secretary of State

19. Mr Brodie addressed four issues:

19.1 The adequacy of the statement of reasons
19.2 Whether there could be said to be apparent bias in the circumstances of this case
19.3 Actual bias
19.4 Waiver

Adequacy of the Statement of Reasons

20. Mr Brodie said that in this case the tribunal had expert evidence from three EMPs and the GP. They had analysed the evidence and given clear reasons for why they had preferred the evidence of Dr B. He noted the following points:

- the tribunal noted that Dr L saw the claimant on a day described as "sorer than average", while Dr B saw her on "an average day". They accepted that this report [Dr B's] represented the claimant's usual condition.
- the tribunal narrated the claimant's symptoms and found that her description of the severe limited ability to walk as inconsistent with the bulk of the medical evidence and noted that both Dr B and Dr I reported no muscle wasting or functional impairment;
- The GP reported her moving freely/walking normally when he saw her before her benefit was removed. The situation changed when he saw her for a report after that.
- The tribunal had given reasons why they discounted Dr L's report. It was in marked contrast to those of Dr B and Dr I. The report was based on what the claimant had told him and was on a worse than average day, so was "not regarded as representative of the claimant's usual condition";
- there was a comment on the claimant's challenges to the GPs evidence and the fact that she had described on fall as happening at three different times to different doctors.
- the tribunal had then said why the preferred Dr B's report – the comment on which the claimant founded as showing bias.

21. He submitted that the tribunal had given clear reasons why they had preferred the evidence of Dr B to the other doctors, but it was also clear that they had not founded exclusively on that evidence, but had regard to the other material as well. He said this filled the *Wordie Property v Secretary of State for Scotland* 1984 SLT 345 at 348 test. He drew my attention to how the courts treated expert evidence; *Davie v Magistrates of Edinburgh* 1953 SC. 34; *Lovely v Trenton* [1990] 1 MEd LR 117. The test was that expert evidence need to be tested by reference to reasoning, logic and his flexibility of mind when under cross-examination.

Apparent bias

22. Mr Brodie made the point that I was concerned with whether or not the tribunal could be said to be biased and it was not a question of bias by Dr B. He said that CSDLA/1019/99 was of no assistance in this case. He said that CSDLA/1019/99 determined the test to be applied and then applied it to the facts and circumstances in that case and decided that as Dr

A spent her time, when not on a tribunal, as an EMP, that she might be seen to be favourably disposed to an EMP report.

23. He then considered the test to be applied. He said that the position now was that the common law and the Article 6 of the ECHR test for bias was the same. He said that at the time of CSDLA/1019/99 the law in England was in a flux because the decision in *R v Gough* [1993] AC 646 meant that the law in England was out of line with that in Scotland, the Commonwealth and ECHR jurisprudence. He referred me to *Hoekstra v HMA (No 2)* 2000 JC 391; *In re Medicaments and Related Classes Goods (No. 2)* [2001] 1 WLR 700; *Porter v Magill* [2002] 2 WLR 37; *Lawal v Northern Spirit* [2002] EWCA Civ 327[1]. The test in Scotland and in England, which both reflect ECHR jurisprudence, following *Porter* were now the same. Lord Hope of Craighead had set the English test in *Porter* saying:

> "**102** In my opinion however it is now possible to set this debate to rest. The Court of Appeal took the opportunity in *In re Medicaments and Related Classes of Goods (No 2)* [2001] 1 WLR 700 to reconsider the whole question. Lord Phillips of Worth Maltravers MR, giving the judgment of the court, observed, at p 711A-B, that the precise test to be applied when determining whether a decision should be set aside on account of bias had given rise to difficulty, reflected in judicial decisions that had appeared in conflict, and that the attempt to resolve that conflict in *R v Gough* had not commanded universal approval. At p 711B-C he said that, as the alternative test had been thought to be more closely in line with Strasbourg jurisprudence which since 2 October 2000 the English courts were required to take into account, the occasion should now be taken to review *R v Gough* to see whether the test it lays down is, indeed, in conflict with Strasbourg jurisprudence. Having conducted that review he summarised the court's conclusions, at pp 726-727:
>
> "85. When the Strasbourg jurisprudence is taken into account, we believe that a modest adjustment of the test in *R v Gough* is called for, which makes it plain that it is, in effect, no different from the test applied in most of the Commonwealth and in Scotland. The court must first ascertain all the circumstances which have a bearing on the suggestion that the judge was biased. It must then ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility, or a real danger, the two being the same, that the tribunal was biased."
>
> **103** I respectfully suggest that your Lordships should now approve the modest adjustment of the test in *R v Gough* set out in that paragraph. It expresses in clear and simple language a test which is in harmony with the objective test which the Strasbourg court applies when it is considering whether the circumstances give rise to a reasonable apprehension of bias. It removes any possible conflict with the test which is now applied in most Commonwealth countries and in Scotland. I would however delete from it the reference to "a real danger". Those words no longer serve a useful purpose here, and they are not used in the jurisprudence of the Strasbourg court. The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased."

The Scottish test remained that approved in *Bradford v Macleod* 1986 SLT 244, which had been approved in *Hoekstra* and by Lord Hope of Craighead in *R v Bow Street Metropolitan Stipendiary Magistrates ex p Pinochet Ugarte (no 2)* [2000] 1 AC 119 which was:

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[1] At the hearing it appeared that Mr Brodie and I had different e-versions in that his copy had [53] paragraphs and mine, taken from the Courts Web-site had [50]. I have used the version I downloaded the day before the hearing as perhaps representing editorial revisals made by the court after the judgement was first handed down.

> "This principle which applies to criminal trials also applies to persons performing judicial duties in a domestic forum. The rule was well expressed by Eve J. in *Law v. Chartered Institute of Patent Agents* ([1919] 2 Ch 276] at p. 289 where he said: "Each member of the council in adjudicating on a complaint thereunder is performing a judicial duty, and he must bring to the discharge of that duty an unbiased and impartial mind. If he has a bias which renders him otherwise than an impartial judge he is disqualified from performing his duty. Nay, more (so jealous is the policy of our law of the purity of the administration of justice), if there are circumstances so affecting a person acting in a judicial capacity as to be calculated to create in the mind of a reasonable man a suspicion of that person's impartiality, those circumstances are themselves sufficient to disqualify although in fact no bias exists." That dictum, in my opinion, also represents the law in Scotland upon this matter."

In *Hoekstra* paragraph [17] it was suggested that 'apprehension of bias" might be better than 'suspicion'.

24. Other points he took from the cases included (i) the personal impartiality of a judge must be presumed until there was proof to the contrary (*Hoeskstra* paragraph [15]) and *In re Medicaments* paragraphs 83), (ii) the test for apparent bias was an objective test, where there was no actual bias (*Hoeskstra* paragraph [15], *In re Medicaments* paragraphs 83 & 84), (iii) that the court must first ascertain all the circumstances which have a bearing on the suggestion that the judge was biased and then ask whether those circumstances would lead a fair minded and informed observer to conclude that there was a real possibility that the tribunal was biased (*In re Medicaments* paragraphs 85; *Porter* paragraph 104). I drew Mr Brodies attention to the fact that in *In re Medicaments* the reference was to the court ascertaining the facts, whereas in *Lawal* the court referred to ascertaining relevant facts which the informed observer would consider. I considered that there might be different facts which a court could ascertain from those that an informed observer might be able to access. Mr Brodie's position was that it was for the person alleging bias to put before the courts the facts on which they intended to rely in showing apparent bias and it was not for the court to undertake an investigation of its own. I agree with that submission.

25. Mr Brodie relied on *Lawal* as supporting his position that there was no apparent bias in the present case. In *Lawal* the issue was that the QC for the defendant sat from time to time as a member of the Employment Appeal Tribunal. L's argument was that:

> "[9] ... The essence of the argument is that lay members of the Appeal Tribunal are colleagues of the part-time judges with whom they have sat from time to time; that such lay members might be subconsciously influenced by that previous professional relationship formed in the tribunal and by a sense of collegiate loyalty to him; and that, as the part time judge is the only legally qualified member of the tribunal, the lay members would tend to look to him for guidance on the law, thereby creating an opportunity for the development of a degree of authoritative personal influence by the part-time judge over the lay members."

This argument was rejected by Mummery LJ with whom Lord Phillips MR agreed (Pill LJ dissenting) who said:

> "20. ... The Recorder objection amounts to no more than an assertion that a lay member might possibly be more disposed to accept the submissions of one party's

> legal representative than those of the other side, as a result of the professional experience of having sat on the tribunal with him in his capacity as a part-time judge. That is merely a speculative and remote possibility based on an unfounded and, some might think, condescending assumption that a lay member sitting with another judge on the hearing of an appeal cannot tell the difference between the impartial decision-making role played by a tribunal panel of a judge and two lay members and the adversarial role of the partisan advocates appearing for the parties."

Lord Phillips MR did qualify his approval by saying that there would be more substance in the concerns if the advocate sat with such frequency that it might lead the lay members to view him as a judge, appearing part time as an advocate, rather than the reverse.

26. With regard to the onus on the applicant Mr Brodie said that the issue was how often had the tribunal members sat with Dr B, and not how many times had Dr B sat as a tribunal member. Vague connections were not enough; *Salaman* App No. 43505/98 ECtHR 15 June 2000 (Admissibility decision), where issue was that judge, and some of the counsel and parties were free masons and this connection was rejected as sufficient to found apparent bias. It was also relevant to know, and there was no information, on how often these members had sat on a tribunal that had considered reports from Dr B. There was no evidence that they knew him as an EMP. There was no evidence of friendship or close friendship. There was no evidence of how the EMP system worked. It had changed since CSDLA/1019/99. This was not a case of adjudication between EMP and GP, but was a case of deciding between three EMPs. It was clear that any objection to the medical member had been waived, so links with the medical member and the EMP were irrelevant. Therefore the tribunal did not have knowledge of Dr B in the function he was performing on that day. He gave the example of a part time judge later giving evidence on astrophysics – the court would not be biased by reference to the fact that they knew him as part time judge. He said there was no employment or hierarchical connection between Dr B and the tribunal members. He said that Dr B had no interest in the outcome of the case. He said that Dr B did not appear in person and as all the tribunal had was his report so they were unlikely to found on the connection. I put it to Mr Brodie that the converse might apply in that if the tribunal knew Dr B, but not the other EMP, that they might be inclined to favour his evidence as they did not have the opportunity of seeing the others to compare them. He accepted this might apply both ways.

Actual bias

27. Mr Brodie said there was no evidence of actual bias. The Statement of Reasons provided no basis for showing that there was actual bias.

Waiver

28. Mr Brodie accepted that the onus was on the Secretary of State to establish waiver. He made reference to *Miller v Dickson* 2001 SLT 988 (PC). However, he said that in the present case a *prima facie* case of waiver was established and it was for the claimant to respond. The question was did she know that Dr B served on tribunals at the time of the hearing – this had been admitted at the hearing. The claimant should therefore be taken to have waived any right to raise this issue now as she had not raised in at the tribunal. He did not depart from a claim of waiver, although it was my impression that the issue was not strongly pressed.

Reasons for my decision

Statement of Reasons

29. Leaving aside the issue of bias, I hold that the Statement of Reasons is adequate. Indeed it is not just adequate, but is a full and careful document that passes any reasonable test on the adequacy of the Statement of Reasons; *Wordie Property*; *Robertson v City of Edinburgh District Licensing Board 1995* SLT 107 where the Extra Division said

> "In our view it is necessary in a case of this kind that the informed reader, a person who knows what the proceedings are about and is perhaps a party to the proceedings, should be able to understand from the statement of reasons what the reasoning was that led to the decision. In this particular case we have no doubt at all that the reasons are both sufficient and intelligible."

30. In the present case, and under reference to the points alluded to by Mr Brodie, I consider that the tribunal have given careful reasons as to why they accepted one EMPs evidence in place of another. It is also significant that they have not accepted one and rejected the others, but have explained why they accept part of the evidence of one Report and not other parts and the extent to which they have accepted the evidence of the GP and why they have rejected part of the evidence of the claimant.

31. I specifically reject the ground of appeal that the tribunal has not given enough reasons to justify why they accepted Dr B's report in preference to the two other EMP Reports. The main reason given is that Dr B's Report was made in respect of a day described by the claimant as a normal day, whereas Dr L's Report was made on a day described by the claimant as sorer than average. There is no suggestion that Dr I's Report was rejected. The tribunal appear to accept that Dr I's Report is supportive of Dr B's as they reject Dr L's Report on the basis that is it in marked contract to Dr B's and Dr I's Reports.

Actual bias

32. I reject the appeal, if it is based on actual bias. In *In re Medicaments* at paragraph 38 it was said that "The phrase "actual bias" has not been used with great precision and has been applied to the situation (1) where a judge has been influenced by partiality or prejudice in reaching his decision and (2) where it has been demonstrated that a judge is actually prejudiced in favour of or against a party".

33. In my opinion there was no evidence before me that the tribunal were actually biased. The claimant founds only on the wording of the Statement of Reasons and in particular on the passage quoted that "the tribunal placed most weight on Dr (B)'s Report. He is experienced in carrying out assessments of functional impairment and disinterested in the outcome." In my opinion, taken alone or, more particularly, taken in context, I see nothing in that phrase or in the Statement of Reasons that demonstrates actual bias.

34. Every tribunal has to decided between competing evidence and the fact that more weight is given to one expert or that one line evidence is accepted in preference to another does not demonstrate actual bias by the tribunal, without substantially more evidence to support the accusation of bias. There is nothing in the material before me to overcome the presumption that the personal impartiality of a judge must be presumed until there was proof

to the contrary (*Hoeskstra* paragraph [15] and *In re Medicaments* paragraphs 83). The claimant's case was predicated on the basis that the description applied equally to the other two EMPs. I agree and in that sense it is unfortunate that one EMP has been singled out from the others for this epithet. However it is clear that there was no criticism of Dr L. His evidence of the claimant's condition was not accepted as evidence of her average condition because he saw her a "sorer than average" day. Dr I was found to be supportive of Dr B, but I agree that otherwise no particular reason is given as to why Dr B was preferred to Dr I. In rejecting this phrase as showing actual bias I do accept that it goes some way to supporting an inference that there might have been apparent bias.

Apparent bias

35. The appeal was presented to me on the basis that the Statement of Reasons demonstrated actual bias. I could deal with the appeal on that basis, dismiss it and hold that there was in fact no appeal on the issue of apparent bias. I am reluctant to do so as the Secretary of State thought the appeal related to apparent bias and was rather taken aback by the approach taken by the claimant's representative. When pressed the representative did say she would also found on apparent bias. In any event, as this matter is before me, I consider that it is a point that I would be entitled to take and indeed would be bound to take under the Human Rights Act if I am to act in a way that is compatible with convention rights [section 6(1)]; ie as the appellate jurisdiction from the appeal tribunal, where the whole process has to be article 6(1) compliant if a party is to have a fair and impartial hearing before an independent tribunal; *Albert and Le Compte v Belgium* (1983) 5 EHRR 533 at paragraph 29.

36. As I am sitting in Scotland to determine an appeal from a Scottish Tribunal I consider that I have to apply the Scottish test on apparent bias, if there remains any difference with the approach in England – CSDLA/1019/99 at paragraph 70. I am of the opinion that there is now no substantial difference.

37. I accept the submission that I am required to have regard to the potential for bias by the tribunal and it is of no concern, whether or not Dr B was biased – there was no suggestion that he might have been. I also accept that Dr B's part time membership of the tribunal from time to time does not preclude a tribunal, whose members have never sat with Dr B, from hearing a case in which he is an expert witness. I agree with the submission by Mr Brodie that I am concerned with the "relationship" that may exist between Dr B and the actual members of the tribunal and whether that relationship might lead the fair-minded and informed observer, having considered the facts, to conclude that there was a real possibility that the tribunal was biased – Lord Hope of Craighead in *Porter* at 103 – or circumstances so affecting a person acting in a judicial capacity as to be calculated to create in the mind of a reasonable man an apprehension of bias - *Bradford v Macleod* 1986 SLT 244 (as revised by *Hoekstra*).

38. I consider that the only relevant material before me on which this issue can be decided is:

- that Dr B regularly sat as a member of the tribunal at Hamilton. Dr B had sat as a medical member at 191 sessions in the preceding two years. On its own this is not relevant.
- He had sat with the chairman on 22 sessions, the member on 14 sessions and with the chairman and the member together on 3 sessions – a total of 39 sessions out of

191. He had not sat with the medical member, no doubt because a tribunal does not usually have two medical members. This information provides material as to a proximate relationship between Dr B and the actual tribunal members.

- I am prepared to accept from the representative's submission that "hundreds" of Dr B's reports were considered by the Hamilton tribunal, that it is likely that the members of this tribunal had had to consider some reports from Dr B on a number of occasions in the preceding two years.
- that the medical member was a former EMP, up to June 2001, and this tribunal sat in February 2002;
- the terms of the Statement of Reasons.

I did not have the full information that was available to the Tribunal of Commissioners that considered the issue in CSDLA/1019/99. I am told that the situation has changed since that case so I cannot rely on the information therein, if relevant, regarding the appointment of EMPs etc.

As objection to the medical member was waived, I am not concerned with any "relationship" between the medical member as a former EMP and Dr B, but only with Dr B's "relationship" with the chairman and the lay member.

39. In *Lawal*, admittedly a close decision, as there was one dissenting opinion, the Court of Appeal held that it could not be said that it was reasonable to apprehend that a lay member of a tribunal would, even subconsciously, react more favourably to an advocate who sat as a part time member from time to time than to one who did not sit [Lord Phillips at 47]. Lord Phillips did go on to say that frequency of sitting might be an issue.

40. The question in this case is whether or not the situation is different, where the issue is between part time membership of the tribunal and appearing as an expert witness. I can readily understand that lay members of a tribunal understand that an advocate presses his client's case to the best of his ability and therefore would not necessarily be influenced by a professional relationship in another capacity. I do consider that the situation is different, where a tribunal is being asked to assess the credibility, reliability or expertise of a witness and to decide what weight to give to their evidence as compared to the evidence of other experts. If there is apparent bias it could work either way depending on what is known from the relationship. I have to decide whether this difference is sufficient to give rise to a real apprehension that there might be bias.

41. I note in *In re Medicaments* at paragraph 37 that that Lord Phillips MR observes that bias can come in many forms and in particular that a judge "may be biased not in favour of one outcome of the dispute, but because of a prejudice in favour of or against a particular witness which prevents an impartial assessment of the evidence of that witness." It is well known that a judge will recluse himself if he knows any of the parties or if he knows any of the witnesses, there being a distinction between know and know of. Equally judges find that particular experts appear regularly before them – it might be said that such experts "have the ear of the court" because the court knows them and respects their expertise. No one suggests that a judge is biased merely because a particular witness appears before him on a regular basis. This is the situation before tribunals where it has been accepted that EMPs can be credited with some special knowledge of how medical reports should be directed to the relevant issues before the tribunal and therefore, having balanced the material, their evidence might be given more weight.

42. That said I have come to the view that an expert witness is in a different position to an advocate, where both are part time members of a tribunal before whom they appear in their respective capacities. I consider that a well informed layman might conclude that there was a real possibility of bias, where an expert appears before a tribunal including members with who he has sat on a number of previous occasions. This is more likely to be so before a tribunal where the evidence is written and the tribunal does not see all the experts giving evidence and being cross-examined so that they can make a proper comparison. If one expert is professionally known to the members, through having sat with them and advised them on how to approach medical evidence, I can see that there is a danger that they will apply their knowledge of him, consciously or unconsciously, to an assessment of the weight to be given to his evidence as against the other Reports, where the doctor concerned might not be known to the tribunal.

43. I take support for this conclusion from the approach taken in CSDA/1019/99 that an EMP sitting on a tribunal might be perceived as possibly favouring the evidence of a fellow EMP. At paragraph 77 the Commissioners said:

> "However, placing ourselves in the position of the objective bystander, we consider that for one of these same doctors to be involved in assessing such reports prepared by other such doctors and then adjudicating in conflicts of evidence between such reports and other evidence causes reasonable apprehension of at least a subconscious bias. Accordingly, and whatever our own judicial view, we think it would be reasonable for an informed member of the public to think that justice may not be done in such circumstances."

I would have reached my conclusion independently of the decision in CSDLA/1019/99 for the reasons given above.

44. As I commented above I consider that the description of Dr B in the Statement of Reasons as "experienced in carrying out assessment of functional impairment and disinterested in the outcome", when the description is not applied to the other EMPs could be said to give rise to an apprehension of bias. While I consider that description as almost "style", where an EMP is to be preferred to another doctor, it might be said to show that the tribunal actually knew from their knowledge of Dr B that he had this special skill, which the other doctors were not know to have developed.

Waiver

45. With some hesitation I reject the submission that there has been waiver in this case. The claimant was represented by a WRO, who was not legally qualified. She appears to have relied on the chairman to raise legal issues of waiver with her. While that might not be reasonable for a lawyer, in the case of a lay person, it could be said that they were not fully aware of their legal rights. I am conscious of the approach in *Millar*, where the Privy Council held that a party had not waived their right to object to a temporary sheriff, just because there was discussion in the legal profession about the issues. I refer to Lord Bingham of Cornhill in *Millar* at paragraphs 34 to 36. The point taken in this case is different from the point in CSDLA/1019/99 and appears to me to be a point, not taken before – indeed *Lawal* came after the appeal was taken. I therefore do not consider that the claimant can be said to have waived her rights in the full knowledge of the situation and the law. Clearly a decision was taken not

to object to Dr B because he was usually "OK", but I consider that decision was not taken with full knowledge so as to amount to waiver.

46. Claimants should be aware that if objection is not taken at the outset to the constitution of the tribunal that there is a real danger that they will be taken to have waived any right to object. As the Commissioner said in CIS/343/94:

> "It is generally not open to claimants, who are dissatisfied with the way proceedings have been conducted, to sit back doing nothing awaiting the outcome of the decision, and when it is adverse to them, then and then only to complain."

As was noted by Mr Commissioner Rowland in CDLA/2050/2002 the comment is predicated on "generally" and that whether or not there has been waiver

> "will depend on the circumstances of the case, but it will always be wise for the claimant to raise any complaint about the constitution of the tribunal at, or before, the tribunal's hearing, particularly in a case where the tribunal may reasonably be unaware that the claimant is concerned about its constitution."

Decision

47. For all these reasons I consider that a case of apparent bias has been made out. I shall accordingly reduce the decision of the tribunal. I remit the case to differently constituted tribunal to re-hear the appeal. I direct that the differently constituted tribunal must not include members who have sat with Dr B on any previous occasion. I direct that the new tribunal is not to have a sight of the Decision Notice, Record of Proceedings or the Statement of Reasons from the previous tribunal.

(signed)
Sir Crispin Agnew of Lochnaw Bt QC
Deputy Commissioner
Date: 19 February 2003