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*— Tribunal to consider entitlement down to date of hearing.
— Not necessary to consider whether to 'interfere' with Ao decision, but to consider whether not satisfied*

WMW/GM

Commissioner's File: CSIB/9/96
*28/97

SOCIAL SECURITY ADMINISTRATION ACT 1992

APPEAL TO THE COMMISSIONER FROM A DECISION OF A SOCIAL SECURITY APPEAL TRIBUNAL UPON A QUESTION OF LAW

DECISION OF SOCIAL SECURITY COMMISSIONER

Name: [redacted]

Social Security Appeal Tribunal: Inverness

Case No: 510 95 08001

1. This claimant's appeal succeeds. I hold the decision of the social security appeal tribunal dated 3 November 1995 to be erroneous in point of law. Accordingly I set it aside. I refer the case to the tribunal for determination afresh in accordance with the directions and guidance which follow.

2. In April 1995 the claimant became entitled to incapacity benefit in succession to the former invalidity benefit. In June 1995 an adjudication officer determined that the claimant did not satisfy the "All Work" test and that that was a relevant change of circumstance entitling him to review and revise said award by ending it. It was that decision which the claimant appealed to the tribunal. The tribunal upheld the adjudication officer's decision and against that decision that the claimant now again appeals, with leave of the chairman.

3. Incapacity benefit depends upon whether a person is capable or incapable of work. It is provided for in Part XII A of the Social Security Contributions and Benefits Act 1992. There is no dispute but that the "All Work" test was the relevant test under those provisions applicable to the claimant's case. Nor, I may add, although the original adjudication officer contended that he had power to review under regulation 17(4) of the Social Security (Claims and Payments) Regulations 1987, it is accepted that that introduces no error of law having regard to Tribunal decision CSIS/137/94.

4. The "All Work" test which lies at the heart of this case was authorised by section 171C of the 1992 Act and the regulations thereunder made provide a scheme whereby in respect of certain activities listed in the Schedule to the Social Security (Incapacity for Work)(General) Regulations 1995 there are set out certain descriptors. Accordingly as an individual satisfies these descriptors points fall to be awarded and if a threshold is passed then the test is satisfied and a person is regarded as incapable of work. In the present case only the physical descriptors were in issue and so, in terms of regulation 25(1)(a), the threshold was 15 points.

5. The evidence before the tribunal consisted of that in the form of responses to a questionnaire which reflected the activities and descriptors. The claimant only founded upon the activities of (a) reaching, and (b) lifting and carrying. There was also a medical report by an examining medical practitioner. It recorded that in November 1994 the claimant had undergone an operation to remove a tumour from his right shoulder and had been examined

for pain and recurrence there. Dealing with the activities in questions, the doctor assessed that the claimant could not raise his right arm as if to put a hat on his head (descriptor 9(e)). He recorded marked limitation of all shoulder movements. On lifting and carrying the doctor concluded that the claimant could not pick up and carry a half litre carton of milk with his right hand (descriptor 8(e)). That was on the basis that that could not have been done repeatedly and that the claimant normally used his left hand for everything. He assessed right grip as about 25% reduced. All that material was then considered by an adjudication officer who concluded that according to the information from the claimant on the questionnaire he scored 6 points and according to the information from the examining medical practitioner the claimant scored 12 points. Neither was sufficient to satisfy the threshold of 15 points. Hence the appeal to the tribunal.

6. In a written submission to the tribunal, amplified by verbal evidence thereat, the assessments thus far seem to be accepted. The appeal was based upon consideration of two further activities. The reasons why these had not been earlier mentioned were gone into but I need not be concerned with them. The two new activities were that of sitting in an upright chair with a back, but no arms (3) and manual dexterity (7). The latter was really related to the reaching activity, the contention being that the claimant's inability to reach with his right hand meant that its dexterity meant that he satisfied at least one of the descriptors related thereto. Equally it was contended, as I understand it, that the pain in his right shoulder meant that he would become uncomfortable before he had been sitting in the prescribed chair for 30 minutes and would have to move from it. Either of the descriptors now brought forward, if satisfied, would have carried the claimant over the threshold.

7. The tribunal made no independent findings of fact. They did not record whether the facts set out by the adjudication officer had been agreed, or were not controversial. It has too often been said that a tribunal must make its own findings of fact to demonstrate its independence, except in extreme cases of which this is not one. In their so called findings of fact the tribunal record that they had regard to a letter from the claimant's general practitioner and one from the local hospital where he had been treated. But nothing is said as to what the tribunal took from these letters. Accordingly I regard this decision as woefully inadequate, containing no findings of fact, properly so called, at all. The reasons for the decision are given thus -

"The tribunal was not satisfied on the basis of the evidence that there were grounds for interfering, taking the appellant's current state of health, with the AO's decision. The appellant is left handed. His score from his own assessment (reaching and lifting and carrying) coincides with the medical assessment of 12.

While it is possible that the appellant's problems may increase in which case a different result may be found, in the Tribunal's view the score of 12 was appropriate and the applicant's incapacity did not qualify him for the All Work Test in Regulation 24."

I regret to have say that I regard these reasons also woefully inadequate. The task of the tribunal was not to consider whether there were grounds for interfering with the adjudication officer's decision. The tribunal's duty was to consider to what extent the claimant satisfied the various descriptors that were raised before them and to award points accordingly and from that to conclude whether or not he satisfied the all work test. That they manifestly have not done. There is, even in the reasons, no mention of the two additional grounds which were

introduced for determination before them. There should have been clear findings on these further descriptors and the consequence of any further points to be awarded taken into account. It may be that the tribunal were handicapped by the lack of the normal form which tribunals have been wont to complete reflecting the descriptors held to be satisfied. Whilst that form of itself is no part of the statutory procedure I have noted that recent tribunal decisions seem to be being made without its benefit. I regard it as a useful guide for tribunals and a way of making sure that their precise findings on the central issues in a case concerning incapacity benefit are properly recorded and made intelligible. The new tribunal will require to approach this claimant's case with rather more care and in rather greater detail than did the old tribunal.

8. It will be seen from what has been said above that I have accepted the claimant's third ground of appeal. The second ground refers primarily to the claimant's intake of analgesia. I am not sure of the relevance of that, however, given that until the new activities were raised before the tribunal there was really no dispute about the proper assessment of the claimant. The first ground, which is concerned with apparent rejection of evidence, is accepted to the extent noted above. If the tribunal were rejecting the new grounds and the evidence thereon then the reasons for that should have been clearly set out. There are no reasons given for that at all. Equally it follows that I have largely accepted the careful and detailed submission of the adjudication officer now concerned.

9. Finally, I should note that in response to the adjudication officer's submission to the Commissioner the claimant's representative has referred to various factual matters. These, so far as relevant at the date of the original adjudication officer's decision, will certainly require to be taken into account by the new tribunal but they are not the concern of the Commissioner. The tribunal was really the fact finding forum. The Commissioner is only concerned with the proper application and implementation of the law. On the other hand I also note that the claimant appears to have suffered substantial deterioration during the dependency of this case. The new tribunal, in the event that they find the All Work Test satisfied, in the sense of concluding that at least 15 points fall to be awarded to the claimant as at the date of the original adjudication officer's decision, will therefore, of course, restore incapacity benefit to him. They will require in any event also to consider matters down to the date of their hearing and determine whether that award would, in normal course, by reason of the deterioration I have mentioned, or any other relevant change of circumstance, fall to have been reviewed and revised and if so to determine what was the proper effect thereof and whether on one or more occasions, giving dates in each such situation. Thus I note that the claimant appears to have been again in hospital. It may be that General Regulations 12 and 27 would then have arisen for consideration. The adjudication officer should be in a position to offer guidance to the new tribunal on the post-application period. It is not for me to offer further assistance in the absence of the facts. It may be more difficult, but in the event that the tribunal conclude again that the adjudication officer's decision in June 1995 was correct then they will have to consider, in a similar way, whether that cessation of benefit operated from the date of the decision throughout the period before them or whether, at some subsequent date and by an exercise similar to that just discussed, the claimant would fall to be awarded in excess of 15 points because of a relevant change of circumstances such as any subsequent deterioration. In that event they will have to make an appropriate determination or determinations in line with the guidance already given. It does not seem to me to be appropriate to leave the claimant at some later date to make and rely upon a fresh claim for time limits through no fault of his, may then operate against him.

10. As already indicated, it would be helpful for the guidance of the new tribunal if the presenting adjudication officer were to be in a position to provide more detailed guidance to them depending upon what exactly has transpired, and when, since the claim although I appreciate that it may not be possible to do that entirely in writing. Finally, I should draw to attention that, with effect from 6 January 1997, the regulations and the activities in question have, so far as the descriptors for the latter are concerned, been to some extent amended by the Social Security (Incapacity for Work and Miscellaneous Amendments) Regulations 1996. The new tribunal, and indeed the adjudication officer's guidance, will have to take those amendments into account with effect from that date.

11. The claimant's appeal succeeds and the case is referred to the tribunal accordingly.

(Signed)
W M WALKER QC
Commissioner
Date: 21 March 1997