DECISION OF SOCIAL SECURITY COMMISSIONER

1. My decision is that the decision of the social security appeal tribunal given at Glasgow on 13 October 1997 is erroneous upon a point of law. I set it aside. I remit the case to a freshly constituted social security appeal tribunal for a rehearing.

2. This case came before me for an oral hearing on 14 April 1999. The claimant was represented by Mr Orr, a Welfare Rights Officer of the City of Glasgow Council. The adjudication officer was represented by Miss Caldwell Advocate instructed by Mrs Gibson of the Office of the Solicitor to the Secretary of State for Scotland.

3. The claimant made a claim for incapacity credits. The claim form is recorded at pages 1 to 29. A medical certificate dated 25 June 1996 and a further certificate dated 23 July 1996 were produced by her. The date upon which the claimant indicated she wished to claim from was stated to be 14 May 1996. It was not disputed between the parties that the test which fell to be applied in respect of the question of incapacity for work which is an essential prerequisite of entitlement to incapacity credits was the All Work Test. The claimant was submitted to an all work test and an adjudication officer in a decision recorded at page 110 dated 22 October 1996 determined that the claimant did not satisfy the all work test from and including 22 October 1996 because she had not reached 15 points from physical descriptors. The total points awarded amounted to 9. The claimant appealed against that decision to a social security appeal tribunal. The adjudication officer in a submission recorded at pages B to G of the bundle submitted in paragraph 1 of that submission that the tribunal should make a decision as set out in it as opposed to that made by the adjudication officer.

4. The claimant's appeal was heard by a social security appeal tribunal on 13 October 1997. The claimant was represented on that occasion by Mr Campbell a Welfare Rights Officer of the City of Glasgow Council. Her appeal was unsuccessful as can be seen from the decision of the tribunal recorded at page 114. That decision was in the following terms:-

> "Appeal refused. Claimant does not satisfy the All Work Test from and including 22/10/96."

It appears, having regard to what is said in the reasons, that the tribunal made their decision in accordance with the adjudication officer's submission to them in respect of the proposed substitution, though they did not set out at length the proposed substitute decision.

5. The claimant has appealed against that decision to the Commissioner. Her written grounds of appeal are in the following terms:-

> "I believe that my case was a review of an AO case and R(S)3/90 should apply the onus I believe shifts to the AO in such cases. My appeal was not against Incapacity Credits which are awarded by the Secretary of State."

Initially an adjudication officer in a submission to the Commissioner did not support the claimant's appeal. However in a subsequent submission the appeal was supported.

6. Mr Orr in his submission rather departed from the grounds of appeal and directed my attention to the activity of manual dexterity. It was his position that manual dexterity was an activity which was clearly in issue before the tribunal. He referred to the original application at page 6, the incapacity for work questionnaire at page 34 and page 44, the BAMS report at the clinical history on page 56 and the BAMS doctor's acceptance that there was a problem with manual dexterity in respect that he records that there was pain in the claimant's fingers on movement. He also referred me to page 111 which contained the claimant's grounds of appeal to the tribunal in which the claimant also made reference to this activity. He readily accepted that when the case came before the tribunal the record of proceedings discloses that the activity of manual dexterity was not put in issue by the claimant's representative. Indeed it is apparent that it was descriptors 2(c), 8(d) and 9(d) which were concentrated upon. It was however his position that the tribunal erred in law because they did not address the activity of manual dexterity in reaching their decision. He referred me in that connection to paragraph 31 of CIS/3299/97 in which Mr Commissioner Rowland under reference to:-

> "*Regina v Deputy Industrial Injuries Commissioner ex parte Moore* [1965] 1 Q.B. 456 (C.A.) (also reported as an appendix to R(I) 4/65);

quoted Diplock L.J. who said:

> "In dealing with appeals of these kinds, the insurance tribunal, namely the local appeal tribunal or the Commissioner or Deputy Commissioner as the case may be, is exercising quasi-judicial functions, for at this stage it has conflicting contentions before it, those of the claimant and those of the insurance officer who has disallowed the whole or part of the claim. But there is an important distinction between the functions of an insurance tribunal and those of an ordinary court of law, or even those of an arbitrator. As was pointed out by the Divisional Court in *Regina v Medical Appeal Tribunal (North Midland Region), exparte Hubble* [1958] 2 Q.B. 228, 240, a claim by an insured person to benefit is not strictly analogous to a *lis inter partes*. Insurance tribunals form part of the statutory machinery for investigating claims, that is, for ascertaining whether the claimant has satisfied the statutory requirements which entitle him to be paid benefit out of the fund. In such an investigation neither the insurance officer nor the Minister (both of whom are entitled to be represented before the insurance tribunal) is a party adverse to the claimant. If an analogy be sought in ordinary litigious procedure, their functions most closely resemble those of *amici curiae*. The insurance tribunal is not restricted to accepting or rejecting the respective contentions of the claimant upon the one hand and of the insurance officer or Minister on the other. It is at liberty to form its own view even though this may not coincide with the contentions of either."

Mr Commissioner Rowland then went on to say:-

> "In *Hubble*, the Divisional Court had used the analogy of an inquest rather than an action. It seems to me that there is clearly a duty upon a tribunal to ensure that all relevant questions have been asked of a claimant. It could not be otherwise, given the complexity of social security law and the fact that few claimants have advisors and that many are poorly educated."

It was Mr Orr's submission under reference to that authority that the tribunal erred in law by failing to exercise its inquisitorial jurisdiction in order to explore the activity of manual dexterity and make specific findings thereon.

7. I do not accept that submission. I fully accept that the role of the presenting officer on behalf of the adjudication officer resembles that of an *amici curiae* and that the tribunal have to bear in mind that theirs in an inquisitorial jurisdiction and not an adversarial one in the sense set out by Diplock L.J. However if a claimant is represented, as was the position here, by a welfare rights officer employed by a responsible local authority the tribunal is entitled to rely upon such a representative taking up the issue and points he considers to be proper, adequate and necessary for the determination of his client's appeal. They are entitled to take the view that the claimant's representative knows what case he is proposing to make on behalf of his client. To hold otherwise would put an impossible burden upon tribunals who are expected to conduct a substantial number of appeals at each sitting.

8. Mr Orr also made reference to what was said by the Commissioner in CSIS/17/96 at paragraph 10 in relation to manual dexterity and reasonable regularity in being able to perform descriptors under that activity. While in no way would I dissent from what was said by Mr Commissioner Walker QC in that case in paragraph 10 it does not I think assist the claimant in this case in relation to whether the tribunal erred in law because the claimant's representative for whatever reason in making submissions and presenting evidence to the tribunal chose not to do so in respect of the activity of manual dexterity and as I have indicated the tribunal were entitled to rely on that.

9. I have however come to the conclusion that Mr Orr's submission that in general terms the tribunal have failed to give adequate facts and reasons for their decision is well founded despite a forceful argument to the contrary by Miss Caldwell. The summary of grounds in the decision notice is wholly illegible and it is thus not possible to determine what reasons were given to the claimant at the time. In the statement of facts and reasons for the tribunal's decision the tribunal said:-

> "The claimant's evidence about stairs was quite clear, was in line with the medical evidence and she was entitled to 4 additional points by being given 7 points for 2(c)."

It is not at all clear whether these 4 points fell to be added to the 9 awarded by the adjudication officer or the 6 said to be appropriate by the BAMS doctor. The adjudication officer was prepared to award 3 points in respect of the activity of bending and kneeling whereas the BAMS doctor made no such award. The tribunal further in their reasons said:-

> "They considered all the medical evidence and Dr Conn. the Medical Assessor. explained that her main ailment, which under this new name is actually fibrositis. affects soft tissues rather than joints and made other comments and explanations and the tribunal decided that the BAMS report was a full and accurate summary of the claimant's difficulties and it was the preferred medical evidence. No medical evidence was produced by or on behalf of claimant."

Miss Caldwell said that this reference related to the 3 particular descriptors addressed by the tribunal, namely 2(c), 8(d) and 9(d). However I consider that what is said by the tribunal is

ambiguous. It is not apparent to me why if the BAMS report was a full and accurate summary of the claimant's difficulties and was the preferred medical evidence the additional 4 points were awarded by them for 2(c) and if the tribunal considered that the points awarded by the adjudication officer were appropriate. Accordingly in my view the statement of facts and reasons is inadequate. The decision errs in law. It must be set aside. There were other arguments addressed to me by Mr Orr in relation to whether the tribunal had taken into account the issue of reasonable regularity and respect of some descriptors and that they had misapplied the "cannot" test. It is not necessary for me given the view I have taken to go into that matter and I will give appropriate directions to the freshly constituted tribunal.

10. The basis of the adjudication officer's support for the appeal raised an interesting and difficult question. Regulation 28 of the Social Security (Incapacity for work) (General) Regulations 1995 provide:-

> "28.-(1) Where the all work test applies, the test shall, if the conditions set out in paragraph (2) are met, be treated as satisfied until a person has been assessed or until he falls to be treated as capable of work in accordance with regulation 7 or 8.
>
> (2) The conditions are -
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> (a) that the person provides evidence of his incapacity for work in accordance with the Social Security (Medical Evidence) Regulation 1975 (which prescribe the form of doctor's statement or other evidence required in each case); and
>
> (b) that it has not within the preceding 6 months been determined, in relation to his entitlement to any benefit, allowance or advantage which is dependent on him being incapable of work, that the person is capable of work, or is to be treated as capable of work under regulation 7 or 8 unless-
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> (i) he is suffering from some specific disease or bodily or mental disablement which he was not suffering from at the time of that determination; or
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> (ii) a disease or bodily or mental disablement which he was suffering from at the time of that determination has significantly worsened; or
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> (iii) in the case of a person who was treated as capable of work under regulation 7 (failure to provide information), he has since provided the information requested by the Secretary of State under regulation."

11. In the context of that statutory provision it was conceded that the all work test applied in the circumstances of the claimant's claim for incapacity credits and that the conditions set out in paragraph (2) were met. In these circumstances it was submitted by Miss Caldwell that a decision had been made by an adjudication officer to treat the all work test as having been satisfied, the conditions in paragraph (2) having been met. I was told that there was no practice of writing such a decision down or issuing it in writing to the claimant. It was simply said that a decision is made and put into effect. Thus I asked to accept that there is an unwritten, unintimated decision whose date is not known and apparently cannot be

ascertained. The thrust of Miss Caldwell's submission was that once the all work test had been carried out it was necessary for the adjudication officer upon assessment of the claimant under the all work test to review the asserted unwritten, unintimated and undated adjudication officer's decision treating the all work test as having been satisfied pending the assessment.

12. Authority for this proposition was produced by Miss Caldwell. In CIB/16092/96 starred decision 45/98 Mr Commissioner Mesher said:-

> "Regulation 28 merely deems the claimant to satisfy the all work test, not to be incapable of work (compare regulations 10 and 27 of the Incapacity for Work Regulations). A decision must still be made by an adjudication officer that, on the basis that the all work test is applicable under section 171C of the Contributions and Benefits Act, the claimant Is incapable of work. It is only a decision on incapacity for work which is given conclusive effect by regulation 19. I conclude therefore that, once there is an actual assessment under the all work test and the deeming of regulation 28 falls away, there must still be a review of the earlier decision that the claimant is incapable of work if that decision is to be altered."

Miss Caldwell also referred me to a decision by the same Commissioner in CIB/3899/97. In paragraph 7 of that decision Mr Commissioner Mesher said:-

> "7. It was common ground before me that, in a credits case where there has not previously been an assessment under the all work test, either the carrying out of the assessment by the adjudication officer or an adverse assessment on the test would amount to a relevant change of circumstances under section 25(1)(b). Thus, whether such a case was one where the incapacity started before 13 April 1995, where review is not possible, or one where the incapacity started on or after 13 April 1995, where review of the adjudication officer's decision on incapacity is necessary, the change brings the statutory deeming of incapacity to an end. In paragraph 31 of the common appendix I held that if the adjudication officer failed to deal with such questions, on appeal a tribunal should conduct any necessary review itself."

She also referred me to a passage in paragraph 12 where he said:-

> "That is so just as much where the earlier decision was given I the context of potential entitlement to contribution credits as where it is given as part of a decision on income support or incapacity benefit. There is a clear distinction from the situation dealt with in the common appendix, where a claimant has previously been deemed to satisfy the all work test. when the carrying out of the all work test assessment for the first time amounts to a relevant change of circumstances because it removes the statutory basis for the deeming continuing."

A decision to the same effect was given by Mr Commissioner Jacobs in CIB/165/97.

13. Miss Caldwell submitted that the tribunal in this case erred in law because they failed to address the question of the review of the asserted unwritten. unintimated and undated decision.

14. Mr Orr added his support to the submission made by Miss Caldwell. He indicates that as far as he was aware the claimant did not get a letter intimating the asserted decision.

15. I am not at all satisfied that it is established that there ever was a decision made by an adjudication officer treating the claimant as satisfying the all work test. This is because when the conditions set out in subparagraph (2) are satisfied then the claimant is to be treated as satisfying the all work test until assessment or until he falls to be treated as capable of work, by operation of law. There is no need for the intervention of the adjudication officer other than perhaps to intimate to the Secretary of State that the conditions are satisfied for the treating provision to take effect. I find it quite extraordinary that it can be asserted that decisions of adjudication officers are made which are not written or recorded, dated and intimated to those to whom the decision affects. I further cannot comprehend how a treating provision which operates by law can require a review upon a change of circumstances when it is not capable of identification as an adjudication officer's decision. Thus there is an absence of a determination which triggers the operation of Regulation 19. In these circumstances it follows that I do not accept what is said by Mr Commissioner Mesher or Mr Commissioner Jacobs. In my view the issue of review does not arise and accordingly the tribunal did not err in law in that regard.

16. The case goes before a freshly constituted tribunal. That tribunal should have regard to the safest and best practice set out by Mr Commissioner Walker QC in CSIB/324/97. The tribunal should also have regard to the concept of reasonable regularity in the contest referred to in paragraph 10 of CSIS/17/96. It also follows from what I have said that it is for the adjudication officer to determine whether the claimant satisfies the all work test and for the claimant if he is to successfully appeal to demonstrate that the tribunal ought to determine the question in his favour.

17. The appeal succeeds.

(Signed)
D J MAY QC
Commissioner
Date: 7 May 1999