THE SOCIAL SECURITY COMMISSIONERS

Commissioner's Case No: CIB/5876/1997

SOCIAL SECURITY ADMINISTRATION ACT 1992

SOCIAL SECURITY CONTRIBUTIONS AND BENEFITS ACT 1992

APPEAL FROM A DECISION OF A SOCIAL SECURITY APPEAL TRIBUNAL
ON A QUESTION OF LAW

DECISION OF THE SOCIAL SECURITY COMMISSIONER

MR COMMISSIONER JACOBS

Claimant:
Tribunal:
Tribunal's Case No:

Decision:

1. My decision is that the decision of the Leeds Social Security Appeal Tribunal held on 20th February 1997 is not erroneous in point of law.

Adjudication history of the case

2. This is an appeal to a Commissioner against the decision of the tribunal brought by the claimant with the leave of a Commissioner. The adjudication officer supports the appeal.

3. The claimant was in receipt of Incapacity Benefit when required to submit to an assessment by means of a self-assessment questionnaire followed by a medical examination and report.

4. In the self-assessment questionnaire, the claimant asserted difficulties with the activities of negotiating stairs, and bending and kneeling. She also commented in respect of a number of activities, but without selecting any particular descriptor. The claimant has been diagnosed as having referred facial pain and non-allergic rhinitis. The examining doctor gave the opinion that the claimant was not disabled in terms of the all work test.

5. An adjudication officer reviewed the decision making the award and terminated the claimant's entitlement from and including 15th February 1996. The adjudication officer, on the basis of the opinion of the examining doctor, awarded no points on the all work test.

6. The claimant appealed to a tribunal against the decision of the adjudication officer. The letter of appeal was in general terms. Subsequently, the claimant signed another letter in the form of a written submission to the tribunal. This letter was either written for the claimant by someone with detailed knowledge of the relevant law or written by the claimant on the advice of someone with such knowledge. The letter argued that the claimant was to be treated as incapable of work because she fell within regulation 27(c) of the Social Security (Incapacity for Work) (General) Regulations 1995 on the basis that "my symptoms are totally uncontrollable". The claimant attended and gave evidence at the hearing of the appeal.

7. The tribunal confirmed the adjudication officer's decision.

8. The claimant applied for the decision of the tribunal to be set aside, but the application was unsuccessful.

The grounds of appeal

9. The claimant's grounds of appeal are that (a) the tribunal wrongly applied regulation 27 and (b) that no presenting officer was present at the hearing.

Regulation 27

10. Regulation 27 of the Social Security (Incapacity for Work) (General) Regulations 1995 as originally enacted read:

"A person who does not satisfy the all work test shall be treated as incapable of work if in the opinion of a doctor approved by the Secretary of State-

(a) he suffers from a previously undiagnosed potentially life-threatening condition; or

(b) he suffers from some specific disease or bodily or mental disablement and, by reasons of such disease or disablement, there would be a substantial risk to the mental or physical health of any person if he were found capable of work; or

(c) he suffers from a severe uncontrolled or uncontrollable disease; or

(d) he will, within three months of the date on which the doctor so approved examines him, have a major surgical operation or other major therapeutic procedure."

11. On the wording of the regulation, the decision was to be made by a doctor approved by the Secretary of State. However, as a result of the decision of the Divisional Court in R. v. Secretary of State for Social Security, ex parte Moule, given on 12th September 1996, that part of the regulation was ultra vires and the decision might be made by an adjudication officer or, on appeal, by a tribunal.

12. From and including 6th January 1996, the original version of regulation 27 was revoked and a new version substituted. Heads (a) and (b) of the new regulation 27(2) only apply where the claimant's condition is life threatening. Head (c) applies where

> "there exists medical evidence that the claimant requires a major surgical operation or other major therapeutic procedure and it is likely that that operation or procedure will be carried out within three months of the medical examination carried out for the purposes of the all work test."

Medical evidence is defined by regulation 2(1) as follows.

"Medical evidence means-

(a) evidence from a doctor approved by the Secretary of State, and
(b) evidence (if any) from any other doctor, or a hospital or similar institution,

or such part of such evidence as constitutes the most reliable evidence available in the circumstances".

13. The tribunal was required to consider the case from the date of the adjudication officer's decision down to the date of hearing: see the Common Appendix to the decisions of the Commissioner in CIB/16092/1996, CIB/90/1997 and CIB/2073/1997. It was required to consider whether the claimant fell within the original version of regulation 27 for any date before 6th January 1997 and whether she fell within the substituted version for any date from and including 6th January 1997.

14. As regards the original version of regulation 27, only heads (b) and (c) required consideration. Head (a) did not apply, because the condition was not life threatening. Head (d) did not apply, because there was no evidence to suggest that any relevant operation or procedure might take place. It is known that the claimant had an operation in April 1997, but the tribunal was not aware of that possibility. There was no evidence or argument to require the tribunal to deal with either of those heads. Its decision is not erroneous in law for failing to do so.

15. As regards head (b), the tribunal found that

> "The only specific disease that is identified is rhinitis and on balance is not a **substantial** risk to mental or physical health such [presumably an error for 'should'] she return to work."

The tribunal's emphasis makes it clear that it did not consider that any risk was substantial. Whether a risk is substantial is a matter of judgment and degree. There is a limit to which it is possible to explain why a tribunal comes to a particular judgment. What is possible varies from case to case. What is required in order to make the tribunal's reasons adequate and so not erroneous in law depends on the circumstances. Where the only diagnoses are referred pain and non-allergic rhinitis and the evidence is as it was before the tribunal, the tribunal's decision that there was no substantial risk does not need to be justified. What requires justification is any suggestion that there might be such a risk. On the evidence available, there was no other decision open to the tribunal on this head of regulation 27. The tribunal's decision speaks for itself in the circumstances of the case presented to it.

16. As regards head (c), the tribunal found that

> "She does not suffer from a severe and uncontrollable disease."

Two matters arise on this passage.

(b) The tribunal did not refer to the possibility that the disease was uncontrolled rather than uncontrollable. The argument put to tribunal was only that it was uncontrollable. The written submission was clearly composed by someone with specialist knowledge and the tribunal was entitled to rely on that and to confine its consideration to the issue raised unless any other issue arose for consideration on the evidence. Given the diagnoses in the claimant's case and the evidence of her condition, no issue arose as to whether the condition was severe and uncontrolled.

(b) As explained in paragraph 16 above, there is a limit to which matters involving judgment and degree are capable of being explained. Regardless of whether the claimant's condition might be uncontrolled or uncontrollable, it still had to be severe in order to fall within this head. As in the case of head (b), there was only one decision open to the tribunal on the evidence before it and that decision speaks for itself.

17. As regards the substituted version of regulation 27, the claimant did not fall within of the heads under which she might be treated as incapable of work. There was no evidence to suggest that her condition was life threatening. There was no evidence, let alone any medical evidence as defined by regulation 2(1), that she was likely to have a relevant operation or procedure within three months of the medical examination. Indeed it was known that she had not.

18. There was no basis for argument that the claimant fell within the substituted version of regulation 27. If the tribunal's decision were erroneous in law for failing to deal with this version, I would give my own decision that the claimant did not fall within it. I prefer to decide that the tribunal's decision was not erroneous in law on this count, because there was no evidence or argument before the tribunal that made its application even a marginal possibility.

The presence of a presenting officer

19. The claimant argues that the tribunal's decision was erroneous in law, because no presenting officer was in attendance. I reject that argument.

20. The significance of the absence of a presenting officer at the hearing of an appeal has been considered in a number of cases. I deal with them in the order in which they were decided. Sometimes the issue is considered in the context of the power to adjourn and sometimes in the context of a possible breach of natural justice. The two are obviously connected, since a breach of natural justice as a result of the absence of presenting officer can only be avoided by an adjournment. However, it is possible that the context may affect the result.

21. In CSB/582/1987, the case concerned a single payment of Supplementary Benefit. The claimant's representative wanted to question a presenting officer, but one was not in attendance. The Commissioner treated this as an application for an adjournment, which the tribunal refused. Relying on the unique nature and role of the presenting officer, the Commissioner said (at paragraph 9):

> "Although I would not go so far as to say that the mere absence of a presenting officer from a tribunal hearing of itself invalidates the proceedings, clearly in this case where there was an implied request for an adjournment which was refused, there was a denial of natural justice, though I mean no criticism of this particular tribunal by so holding. The fact that apparently some of the questions which it was desired to ask were about boots and heating, ie apparently nothing to do with the subject matter of the appeal, is neither here nor there, in my view. There may have been other questions that needed to be

> asked and in any event the principle is that the presenting officer should have been available as an amicus curiae or there should have been an adjournment until the officer could be present if the claimant asked for such an adjournment."

The only questions that might have been asked of the officer of which the Commissioner was aware were not relevant to the appeal and the Commissioner did not inquire into, or seek to identify, the relevant questions which might have been asked of the officer. The Commissioner was considering the failure of the tribunal to adjourn, but his reasoning seems to be based on the fact that the failure to adjourn gave rise to a breach of natural justice.

22. In CSB/383/1988, the case concerned an overpayment of a Supplementary Allowance. The absence of a presenting officer was not raised in the claimant's grounds of appeal, but was raised by the Commissioner when granting leave to appeal. The Commissioner, at paragraph 14, said that the absence of the officer was a "considerable handicap to the proceedings", but he followed his view in CSB/582/1987, paragraph 9 and concluded that the mere absence of the officer did not justify the setting aside of the tribunal's decision. So far as the decision shows, no application (express or implied) for an adjournment was made on account of the absence of the presenting officer.

23. In CS/96/1991, the case concerned an absolute 6 months time limit on claiming an increase of Invalidity Benefit. No presenting officer was present and it seems from the claimant's comments when told of the possibility of an adjournment that he had no made no objection and wanted to proceed with the hearing. However, the Commissioner was of the view (at paragraph 6) that "there may have been some confusion in the claimant's mind and that he is fact wanted to have a presenting officer there to answer any relevant questions." The Commissioner set aside the tribunal's decision for being in breach of natural justice (paragraph 8). There is no indication in the decision of the questions that the claimant might have asked if a presenting officer had attended, but as the Commissioner referred to questions about earlier correspondence, it is possible that there may have been an argument that the claimant had claimed earlier than was thought.

24. In CS/171/1992, the case concerned Invalidity Benefit. No presenting officer had been in attendance and the chairman's note of proceedings contained the statement that "the chairman outlined the DSS's case." The Commissioner interpreted this statement as meaning that the chairman had become associated with the adjudication officer's case with the result that the roles of party to the proceedings and independent appeal body became confused. With respect to the Commissioner, this was a harsh interpretation of the chairman's record, which surely meant no more than that the basis of the adjudication officer's decision had been explained to the claimant so that he would understand why his award of benefit had been terminated. The Commissioner declined to rule on natural justice, as the tribunal's decision was set aside on other grounds, but did remark (at paragraph 9) that

> "in the absence of a presenting officer I consider the appeal tribunal should have seriously considered, at the very least, adjourning the proceedings."

The words "at the very least" must qualify "considered" rather than "adjourning", as it is difficult to see what more the tribunal could have done than adjourn. I read the passage as saying that the tribunal should have considered the possibility of adjourning in the circumstances that arose.

25. In CIS/853/1995, the case concerned notional capital for the purposes of entitlement to Income Support. When the adjudication officer appealed against the tribunal's decision to a Commissioner, the claimant's solicitor argued that the appeal should not be permitted as the adjudication officer had not been represented at the hearing before the tribunal. The Commissioner rejected this argument, but said (at paragraph 9) that

> "it is essential that there should be a presenting officer present, particularly at the hearing of a difficult case such as this. The tribunal is entitled to rely on having the Department's case put to it by the presenting officer and also on the expertise of the presenting officer as to the legislation and as to Departmental practices."

26. In CI/11449/1995, the case concerned the deduction of a gratuity from payments of Disablement Pension. The tribunal allowed the claimant's appeal in the absence of a presenting officer. The chairman's note of proceedings recorded that the "tribunal decided to proceed in the absence of a presenting officer", so the possibility of an adjournment had been considered. The Commissioner said (at paragraph 14 - original emphasis)

> "in particular in cases of this complexity, it is essential that a presenting officer with the necessary expertise should attend the hearing of the social security appeal tribunal. He acts as amicus curiae ("'friend of the court') and is there to give to the tribunal the benefit of his expertise. This particular tribunal was clearly handicapped by there not being a presenting officer present but they cannot be blamed for deciding to proceed nor can the claimant be blamed for not asking for an adjournment."

Despite the complexity of the case, the Commissioner did not criticise the tribunal's decision on adjournment or suggest that there might have been a breach of natural justice.

27. In CS/14220/1996, the case concerned Invalidity Benefit. The claimant applied for an adjournment to allow a presenting officer to explain how the review procedure had been implemented. The tribunal refused the application. One of the claimant's grounds of appeal to a Commissioner was that it was necessary for a presenting officer to be present to answer "vital questions" to the claimant's case. The Commissioner (myself) rejected this ground of appeal, saying (at paragraph 6):

> "The function of the tribunal was to conduct a complete reconsideration of the issues arising for decision on the basis of the evidence and arguments before the tribunal. The tribunal was not examining the process followed by the adjudication officer in order to determine its validity. It was, therefore, irrelevant for the tribunal to receive an explanation of the way in which the review process was implemented, as its reconsideration would correct any defects, even if the appeal was dismissed: see the decision of the Tribunal of Commissioners in R(I) 9/63, paragraph 19. The tribunal was also entitled to take into account, as it did, the time that had passed from the adjudication officer's decision to the date of the hearing."

The decision in this case involved an inquiry into the contribution that the presenting officer could have made if in attendance. The case was considered in the context of the tribunal's refusal to adjourn.

28. My conclusions on the significance of the absence of a presenting officer are as follows.

The value of a presenting officer

(i) The presence at a hearing of a presenting officer who discharges to the full the duties of that complex role can make an invaluable contribution to the quality of the hearing.

(ii) The contribution is particularly important where the case requires the tribunal to have an understanding of Departmental practices.

(iii) However, a tribunal may be assumed to have identified and understood the relevant law, unless it adjourns for the advice and assistance of a presenting officer.

Natural justice

(iv) The mere absence of a presenting officer does not of itself and in all circumstances render the tribunal's proceedings in breach of natural justice and its decision thereby erroneous in law.

(v) There will be an error of law if there is a breach of natural justice in that there was a procedural unfairness in the hearing such that the claimant did not receive a fair hearing: see the decision of the Commissioner in R(A) 1/72, paragraph 5 and the decision of the Tribunal of Commissioners in R(S) 4/82, paragraph 26.

(vi) Whether or not the absence of a presenting officer constitutes or gives rise to a breach of natural justice depends on whether, in the circumstances of the case, the claimant (or another party to the proceedings) was deprived of a fair hearing.

(vii) The status of Commissioners' decisions is set out in the decision of the Tribunal of Commissioners in R(I) 12/75. Single Commissioners normally follow the decisions of other Single Commissioners "in the interests of comity and to secure certainty and avoid confusion on questions of legal principle" (paragraph 21). However, a particular Commissioner's willingness to find an unfairness on the facts and in the circumstances of a particular case, the full background details of which may not appear from the Commissioner's decision, does not carry the force of precedent. This conclusion is supported by the reference to "legal principle" in the above quotation and by the statement (at paragraph 19) that "similarity in underlying facts does not automatically give rise to similarity in the principle to be applied and questions of fact should not be elevated into questions of legal principle."

(viii) With respect, the consistency between some of the applications of the statements of principle in the above cases is not readily apparent and in some of the cases (so far as the facts and circumstances appear from the decisions) there has been a willingness to move from the nature and value of the role of the presenting officer to the conclusion that there was a procedural unfairness that denied a fair hearing without identifying precisely what it was in the circumstances of the case that led to that denial.

(ix) The principle to be applied is this. The absence of a presenting officer is not of itself a breach of natural justice and does not constitute an error of law that requires the tribunal's decision to be set aside by a Commissioner on appeal. However, the absence of a presenting officer may, when coupled with other facts or circumstances in a particular case, be a contributory factor in the denial to the claimant (or any other party to the proceedings) of a fair hearing. Whether or not that is so requires an analysis of the impact of the officer's absence on the fairness of the hearing. The test is not whether or not any particular party to the proceedings wanted a presenting officer to be present, but whether considered objectively the presence of such an officer was necessary in order that there be a fair hearing.

Adjournment

(x) The tribunal must always consider the possibility of an adjournment if an application is made by a party to the proceedings or where the circumstances of the case raise the question of the value of the attendance of a presenting officer.

(xi) There will be an error of law if the tribunal fails (a) to consider an adjournment in a case where consideration is required, (b) to exercise the discretion to adjourn judicially, or (c) to give adequate reasons for its decision.

(xii) A tribunal must adjourn if a failure to do so would lead to a breach of natural justice. There may be circumstances in which an adjournment is appropriate despite the fact that no breach of natural justice would arise if the tribunal were to proceed in the absence of a presenting officer.

(xiii) The fact that the tribunal's decision is erroneous in law does not mean that the claimant will thereby gain a rehearing of the appeal. The Commissioner may consider that the tribunal's decision was correct in law despite the defect in the procedure or the inadequacy of the tribunal's reasons, and substitute a decision to the same effect as the tribunal's.

29. The above conclusions apply where there is an oral hearing of the claimant's appeal. I express no conclusion on their application where the claimant's appeal is determined without an oral hearing. It may be that a breach of natural justice might occur in a such case where a contribution from a presenting officer was necessary, if the tribunal did not adjourn and the chairman did not direct that an oral hearing be held.

30. In the case before me, no procedural unfairness occurred and no basis for consideration of an adjournment arose. The claimant was not denied a fair hearing. I do not undervalue the contribution that a good presenting officer can make to a hearing before a tribunal. The question is whether the absence of a presenting officer gave rise to a procedural unfairness in the case before me such that the claimant was not given a fair hearing. The claimant did not raise the matter in advance or at the hearing. She did not apply for an adjournment in order for an officer to attend. There was a standard submission from the adjudication officer in the papers that she was sent before the hearing. She obviously had access to specialist advice before the hearing. The issues that were considered at the hearing were all factual ones. There has been no suggestion made of any disadvantage to the claimant from the absence of a presenting officer might have given. No question has been suggested that the claimant might have asked the officer. Nothing has been suggested that the officer might have been called on to explain. None of these factors is itself decisive. Their effect is cumulatively.

Conclusion

31. I reject the claimant's grounds of appeal and the adjudication officer's support for those grounds. The papers before me and the circumstances of the case do not raise any other possible error of law that I need to consider. The tribunal's decision is not erroneous in law.

Signed: **Edward Jacobs**
Commissioner

Date: **27th October 1998**