PLH *Commissioner's Files: CIB/13161/96 & CIB/13508/96*

SOCIAL SECURITY CONTRIBUTIONS AND BENEFITS ACT 1992
SOCIAL SECURITY ADMINISTRATION ACT 1992

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

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Introduction

1. In these two appeals questions arose about the correct approach to the "all work test" for the incapacity benefit introduced by the Social Security (Incapacity for Work) Act 1994. In each of them I hold the decision of the tribunal to have been erroneous in point of law, set it aside and remit the case to a fresh tribunal for rehearing.

2. I held an oral hearing of the two appeals together. In case CIB/13161/96, which was an appeal by the claimant against the decision of the tribunal that he was not entitled to benefit, the claimant appeared and conducted his case in person. In case CIB/13508/96, where the claimant had succeeded before the tribunal and it was the adjudication officer who appealed, the claimant was represented by Ms Gill Adam of the London Advice Services Alliance. Mr James Hunt of Counsel, instructed by the solicitor to the Department of Social Security, appeared for the adjudication officer in each case. I am grateful to all three of them for their assistance to me at the hearing.

3. In each of these cases the claimant had been entitled to invalidity benefit under the old legislation before the changes effected by the 1994 Act, and had continued to receive benefit under the transitional provisions until his case was reviewed following a medical examination applying the new tests. Each of them had thus been considered incapable of work of any reasonable kind so as to qualify for benefit under the old law, but under the new was pronounced not to be incapable of work after all.

The facts and the tribunal decisions

4. In case CIB/13161/96, the claimant is a former decorator and glazier now aged 54. His particular problem is that he suffers from Ménière's disease which is a disease of the inner ear that gives rise to intermittent attacks of extreme dizziness, vertigo and nausea. These may last for several days at a stretch and are extremely disabling in their effects. While they are taking place, it is often impossible for the claimant even to stand, he cannot walk or manage stairs reliably, and certainly could not do any kind of work. However in periods of remission between attacks, he can cope quite satisfactorily with most normal activities.

5. The tribunal on 7 December 1995 held that he was not entitled to benefit on the new basis at all, because he scored no points on the "all work test", explained further below. Their conclusion was based on the results of a medical examination during an asymptomatic period when he had no problems with performing any of the relevant "activities" prescribed by the test. He appeals on the ground that although on that particular day he was able to perform them when tested, the tribunal took too narrow a view in focusing on this alone and should have taken account of the intermittent nature of his condition so as to reach a more realistic conclusion about whether he really was capable of going out to work.

6. In case CIB/13508/96, the claimant's normal employment at which he last worked in 1992 was as a plasterer. He is now aged 55 and his problem is multiple joint arthritis. This is variable in its effects but at times makes it extremely difficult for him to move his shoulders and arms. This and the restricted movement in his spine which is also affected would make it extremely difficult for him to work at all reliably: especially at plastering, for which energetic movements with these parts of the body are required as a matter of course.

7. The tribunal on 24 November 1995 determined in the claimant's favour that he was incapable of work, awarding him a test score of 23 points which was more than enough to qualify him for benefit. The adjudication officer appeals against this decision on the grounds that the tribunal's findings and their own record of the points they awarded were inconsistent, and inexplicable having regard to the medical evidence which indicated a much lower score.

Requirements as to reasons not complied with

8. In each of these cases it was common ground by the time of the hearing before me that the tribunal decisions were erroneous, at any rate in the one important respect that the reasons for the conclusions reached were not adequately set out in the record of either decision. In my judgment, the parties before me were plainly right to agree this in both cases, and I am quite satisfied that for that reason alone neither tribunal decision can be allowed to stand.

9. In the decorator's case the tribunal had either taken no account of the evidence about the intermittent bouts of disability suffered by the claimant as a result of his

condition, or failed in their decision to give the reasons for rejecting that evidence as irrelevant. In my judgment they thereby erred in law for failure to set out in the record of their decision an adequate statement of their reasons and findings on a material issue, contrary to reg 23 Social Security (Adjudication) Regulations 1995 SI No. 1801, and the principles well established in case R(A)1/72 and other Commissioners' decisions too numerous to mention. The requirement to give clear and understandable reasons for the conclusion reached must in my judgment apply to determinations about the scores awarded under the new all work test just as much to any other issue before a tribunal.

10. For the same reason, the decision in the plasterer's case has also to be set aside as it is quite unclear from the record of the tribunal's decision how the score they stated the claimant to attain had been arrived at, or how that related to the evidence that had been placed before them.

The assessment of working capacity for Incapacity Benefit

11. The major part of the argument before me focused on how a condition that would previously have been accepted as giving rise to incapacity because its intermittent or variable nature meant there was no job of work the claimant could reasonably be expected to do should be dealt with under the new legislation. This question arises because the test of capacity for work in the great majority of cases is now made to depend solely on the mechanical application of a questionnaire about particular activities, such as how many stairs a claimant can walk up and down, without relating these in any overt way to whether he could ever expect to get any real job in in view of the unreliability and other difficulties imposed on him by his condition.

12. To understand how this comes about it is necessary to look at the legislation itself. This is to be found in part in additional sections introduced into the Social Security Contributions and Benefits Act 1992, and in part in the main regulations dealing with the new benefit: the Social Security (Incapacity for Work) (General) Regulations 1995 SI No. 311.

The primary legislation

13. The primary legislation about incapacity benefit now appears as ss. 30A-30E Social Security Contributions and Benefits Act 1992, taking the place of the former sickness and invalidity benefit provisions in the contributory benefits scheme in Part II of that Act. It must therefore be construed as an integral part of the main system of contributory social insurance in place in Great Britain since 1948, resulting directly from Lord Beveridge's report on Social Insurance and Allied Services, (1942) Cmd. 6404.

14. The essence of such a system is that all members of the working population insure by paying premiums on a universal shared risk basis against the main threats of finding themselves unable to provide for themselves and their families by their own earnings. High among such threats for any person of working age are the risks of loss of earning capacity through involuntary unemployment or illness. Thus the insured risk against which the incapacity benefit provisions must in my view be taken to be intended

by Parliament to provide is the loss of a person's earning power by reason of physical or mental incapacity for work. The form of the cover is a weekly cash subsistence benefit payable as of right to any insured person who has paid his premiums and meets the conditions for a valid claim.

15. By **s.30A**, a person who satisfies the specified contribution conditions is entitled to short-term incapacity benefit in respect of any *day of incapacity for work* which forms part of a *period of incapacity for work*, except that there is no entitlement for the first three days of such incapacity. The maximum period for which a person can receive payment of the short-term rate of the benefit in any one *period of incapacity* is 364 days. If a person reaches this limit **s.30A(5)** provides that he is to be entitled to long-term incapacity benefit in respect of any subsequent *day of incapacity for work* in the same *period of incapacity for work* on which he is not over pensionable age. Under **s.30B** the amount payable by way of incapacity benefit in respect of any day is one-seventh of the appropriate weekly rate, with different short term and long term rates set by the section and a schedule, providing a higher rate of cover for the additional difficulties caused by a prolonged loss of earnings.

16. The entitlement thus arises on a day by day basis for each *day of incapacity* which falls during a *period of incapacity for work*. These terms are defined by **s.30C**, which provides by subs. (1) that for the purposes of any provisions of the Act relating to incapacity benefit, and subject to other express provision,

> (a) *a day of incapacity for work* means a day on which a person is *incapable of work*;
>
> (b) *a period of incapacity for work* means a period of four or more consecutive days, each of which is *a day of incapacity for work*; and
>
> (c) any two such periods not separated by a period of more than eight weeks shall be treated as one *period of incapacity for work*.

17. Later subsections contain regulation making powers enabling days to be treated or not treated as days of incapacity for work, and allowing the Secretary of State to adjust the minimum number of days which can together count as a period of incapacity for work under subs.(1)(b), and extend the maximum gap between such periods to more than eight weeks for the purposes of linking them together under subs. (1)(c). All however hangs on the condition in subs. (1)(a) that a day for which benefit is payable as a day of incapacity for work means a day on which a person is *incapable of work*. The provisions for determining that question are in the new ss. 171A-171G, which constitute a separate Part XIIA of the 1992 Act headed "Incapacity for work".

18. By **s.171A(1)** for the purposes of this Act, save as otherwise expressly provided, whether a person is capable or *incapable of work* shall be determined in accordance with the provisions of this Part of this Act. There then follows a succession of regulation making powers to deal with the providing of information and the carrying out of medical examinations, and the tests themselves are introduced by **ss.171B-C**.

19. Under **s.171B,** the "own occupation test" applies to a person who has recently been in actual work, and remains applicable for a maximum of 196 days during any given *spell of incapacity*, as defined. This test is defined by subs. (2) as "whether he is incapable by reason of some specific disease or bodily or mental disablement of doing work which he could reasonably be expected to do in the course of the occupation in which he was so engaged".

20. By **s.171C,** wherever the own occupation test does not apply or the time for it to apply has run out, the test applicable is the **"all work test".** By subs.(2):

> "(2) Provision shall [sic] be made by regulations -
>
> (a) defining the all work test by reference to the extent of a person's incapacity by reason of some specific disease or bodily or mental disablement to perform such activities as may be prescribed, and
>
> (b) as to the manner of assessing whether the all work test is satisfied."

21. By **s.171D,** regulations may provide for the testing process to be bypassed by a person being treated as capable of work, or as incapable of work, in such cases or circumstances as may be prescribed. **s.171E** contains further regulation making powers to provide, in terms reflecting those of the earlier legislation and the basic principle of insurance, that a person may be disqualified from benefit or treated as capable of work if the reason for incapacity is his own misconduct or he fails without good cause to accept treatment, or to observe prescribed rules of behaviour.

22. Apart therefore from making the main division between the initial period when incapacity for work is to be tested by reference to a claimant's own recent occupation and the later period when it is contemplated that incapacity is to be tested by reference to ability to do any work at all, the degree of incapacity that has to be shown before a person can qualify, and the type of things to be treated as "work" for this purpose are left wholly at large, to be determined by regulations. In this way, very wide powers indeed to define how this important aspect of the insurance scheme is to be implemented have now been entrusted to the Secretary of State.

The secondary legislation

23. Under the Incapacity for Work Regulations there are three different ways in which a person within the "all work test" regime under s.171C may qualify for benefit. First he may be among a number of categories of people, for example those suffering from particularly severe conditions such as tetraplegia, who it would plainly be barbaric if not impossible to expect to try and work. By **regs. 10** et seq. such people are treated as incapable of work without having to submit themselves to any test. Second, he may attain the prescribed score on an assessment under the all work test itself, in accordance with **regs 23-26** and the Schedule. Third, he may fall within a very limited class of exceptional cases under **reg 27** by which a person suffering from (e.g.) a particular life

threatening condition but for some reason not attaining the required number of points on the test is nevertheless to be treated as incapable of work so that he gets the benefit.

24. By **reg 15** a person who at the commencement of any day is, or thereafter becomes [*sc.* during it], incapable of work by reason of some specific disease or bodily or mental disablement shall be treated as incapable of work throughout that day. Thus a person who is out of action at any point during the day is treated as incapable of work for that day. Subject to that, each day for which benefit is to be successfully claimed must be identified as a day of incapacity for work.

25. The only ways in which a condition that is intermittent or fluctuates over a number of days is recognised by the regulations are that:

(1) under **reg 13** people who have to spend days on a regular basis receiving treatment such as kidney dialysis are treated as incapable of work, but only for their treatment days. The minimum four day period in s.171B(3) is relaxed so that people receiving such treatment on two or more days a week get the benefit for those days even though not out of action for a four day continuous period;

(2) under **reg. 24** and **Pt I** of the schedule incontinence or black-outs of a certain frequency over a past period may earn points in the all work test for physical disabilities, by way of exception to the majority of point scores which make no reference to measuring over any period of time; and

(3) under **Pt II** of the schedule the frequency of such factors as accidents from confusion or forgetfulness, or inability to cope through stress, is taken into account in the separate system of measurement of mental disabilities.

Both present cases subject to the all work test

26. It is common ground in each of these two cases that the claimant does not fall within any of the conditions for exemption from the test or within the exceptional cases under reg 27. The only route for either claimant to go on being counted as incapable of work and get the benefit for his incapacity under the new provisions is by passing the "all work test". An earlier suggestion that any apparent hardship involved in this might be able to be cured under reg. 27 was rightly abandoned by the adjudication officer before me.

27. It is also common ground that each of them suffers from a specific disease or bodily or mental disablement which before the new test came into force was severe enough to give rise to incapacity for work in a practical sense and under the old law; and that the realities of his condition have not changed.

28. The former provisions embodied a well established principle explained in numerous Commissioners' decisions, that the assessment of whether a person was or was not capable of work had to be done on a realistic basis. A person was to be treated as incapable of work if in reality unable to hold down any job of work in a way reasonably

likely to meet the requirements of some employer. Hence things he might just be capable of doing, but only irregularly or unpredictably so that no employer would take him on, had for practical purposes to be left out of account: see R(S) 9/79 para 8, CS/90/86 para 6, and CS/19/87 para 9. Entitlement to the benefit thus depended on whether the claimant's condition had in a practical sense robbed him of his earning capacity. This was of course the risk against which the insurance scheme needed to cover him, and what he paid his premiums for while working.

The "all work test" in detail

29. The all work test is defined by **reg 24** as

> *"a test of the extent of a person's incapacity, by reasons [sic] of some specific disease or bodily or mental disablement, to perform the activities prescribed in the Schedule."*

30. By **reg 25**, a person satisfies the all work test when one of more of the "descriptors" in Part I or Part II of the schedule apply to him and the total points scored by those descriptors adds up to a minimum number. The schedule itself is headed "Disabilities which may make a person incapable of work", so there can be no doubt about the purpose of the whole process.

31. The two parts deal with physical and mental disabilities and differ in the way the descriptors work and the points are reckoned. These cases concern only Part I which measures physical disabilities. It is divided into three columns the first of which is a list of fourteen "activities" ranging from "1. Walking on level ground..." to "14. Remaining conscious other than for normal periods of sleep". The middle column contains the descriptors, several of them for each activity, identifying various degrees of disability in relation to it. In the third column a number of points is placed against each descriptor. Thus for the first activity that has to be tested, walking on level ground, there are eight descriptors ranging from (a) "Cannot walk at all" and (b) "Cannot walk more than a few steps without stopping or severe discomfort", each of which carries a score of 15 points, down to (g) "No walking problem" for which the claimant unsurprisingly gets no points.

32. The schedule thus works like a multiple choice questionnaire in which one answer has to be picked for each activity, without any scope for additional comment or qualification of the answer given. By reg 26(3) the highest scoring descriptor is to be picked if more than one applies. The nature of the activities and the descriptors is such that for any person to whom the test is to be applied at all (which will of course exclude people exempted as so badly disabled that a test of the activities would be inappropriate) all fourteen activities have in practice to be considered and a descriptor picked for each.

33. While the heading to the schedule and its legislative context identify its sole reason for existing as being to test for disablement from work, the fourteen activities themselves are specified in entirely general terms. They consist of things like walking, sitting, standing, bending, lifting, reaching and so forth that are in no way restricted to a work situation. The descriptors too refer only to commonplace situations in daily life

such as turning a knob on a cooker, using a pen or carrying a carton of milk or a bag of potatoes, and are obviously intended to reflect a measurement of only the most basic physical and manual skills. There is no indication or apparent scope for any separate or more substantive inquiry into how far a claimant's condition has really depleted his working skills, or whether those he has left are saleable in any real sense to an employer.

34. A further striking feature of the physical disability descriptors is that most of them start with the word "cannot" but fail to indicate whether this is intended to mean that the claimant only gets the points if he cannot ever do the activity described, or gets them if he cannot do it infallibly on a repeated continuing basis, or something in between: perhaps the most basic and obvious question that has to be answered before anyone can begin to apply the test properly and consistently.

35. In this context I was referred to some assurances given in Parliament by Ministers at the time the primary legislation was passing through, as to the way in which the regulations (then of course yet to come) would deal with such matters as the effects of pain and fatigue on a person's capabilities. In the event this failed to appear in the legislation at all so far as I can see, but whether or not it would be strictly right for me to use such assurances as an aid to construction I confess that I found them of little help on the questions which formed the main ground of the argument before me.

36. These questions were how the word "cannot" is to be read, whether the tests are to be assumed to be applied in a working environment, to what extent the issue of practical employability of the claimant plays a part in the test at all, and how one is supposed to deal under the new legislation with an intermittent condition which renders the claimant incapable of reasonable work in the practical sense recognised by the previous law, but likely to attain equally valid scores of either a large number of points on the descriptor scale, or a very few or even none, depending on the day you happen to take into account for the testing.

Test is of normal capabilities, and how far these are impaired

37. In my judgment, the context in which this new benefit test was introduced, and the use of a very basic set of mundane everyday activities intended to test whether a person can really be said to be incapable of any work at all, mean that by necessary implication the simple language used must be read in a reasonably broad and not a restricted literal sense. I do not think it is reading anything into reg. 24 to say that the test is one of the extent to which the disease or disability from which the claimant suffers impairs his normal capacity to perform the stated activities as compared with a person of normal capabilities in full working order.

38. The word "normal" appears twice in that last sentence, and is in my view the key to applying the various descriptors in accordance with the legislative intention. Thus in my judgment the score of 15 points for "Cannot walk up and down a flight of 12 stairs" is applicable to a person who cannot normally do this as and when called upon to do so. It is not necessary to find that he is so incapacitated that he simply could not manage ever to get up a dozen stairs, even with the most supreme effort on one isolated

occasion to avoid some terrible danger. For that matter there is no definition of what is meant by "stairs" in the schedule: but no reasonable person could have any difficulty in reading by implication that these are to be assumed to be stairs of normal size, breadth and grip, not some imaginary set of steep awkward metal stairs in somewhere like a ship's engine room. Similarly the descriptor "cannot use a pen or pencil" in activity 7 ("Manual dexterity") must mean by necessary common sense implication that the claimant scores the points if he is physically unable to use a pen or pencil to write in a normal manner. A fair reading does not need the schedule itself to spell out that this is what is meant, rather than a total inability to wield a pen or pencil for any purpose at all, even punching a hole in a sheet of paper.

39. The question of how far the descriptors are intended to measure a claimant's ability to perform the stated tasks on a repeated basis and without pain must in my judgment be answered in the same empirical way. I respectfully agree with what was said by the Chief Commissioner for Northern Ireland in case no. C1/95(IB) which was cited to me and is I think the only relevant authority on this point. He said in reference to a submission that there was no mention of reasonable regularity in the tests themselves:

> "I agree that apart from those few descriptors in which the word "sometimes" appears, there is no specific requirement that a claimant must be able to perform the activity in question "with reasonable regularity". Nevertheless, a tribunal must in my opinion have regard to some such concept in reaching their decision. The real issue is whether, taking an overall view of the individual's capacity to perform the activity in question, he should reasonably be considered to be incapable of performing it. The fact that he might occasionally manage to accomplish it, would be of no consequence if, for most of the time, and in most circumstances, he could not do so. I consider, moreover, that this approach is broadly supported by the inclusion in a small number of the descriptors of the word "sometimes". The effect of the inclusion of this word is that, whereas in most cases a claimant who could perform the activity "most of the time", but who sometimes was unable to do so, would normally not score any points, where those few descriptors are concerned he qualifies for a modest score. Accordingly, as I see it, there must be an overall requirement of "reasonableness" in the approach of the tribunal to the question of what a person is or is not capable of doing, and this may include consideration of his ability to perform various specified activities most of the time. To that extent "reasonable regularity" may properly be considered. On the further subject of a "working situation", I agree that a tribunal should not have regard to this factor, but should confine their considerations to the claimant's ability to perform the everyday activities specified in the descriptors."

(The reference to a "working situation" reflected an argument that the tribunal had gone wrong in having in mind "a working situation where some repetition would be necessary" in importing the test of reasonable regularity into their interpretation of the word "cannot".)

40. As the Chief Commissioner points out there is no warrant in the regulations for a separate consideration of whether the claimant could or could not perform the listed activities in some imaginary working context such as a factory, if this means that some additional test is to be imported over and above that of whether the claimant can

normally perform these activities in the sense that I have indicated. I am not sure however that the tribunal in that case was really doing more than using their reference to a working context as a common sense reason to justify importing the concept of "reasonable regularity" approved in the passage quoted above. A mere reference to work in that sense would not amount to using it as a separate factor.

41. The reference in that passage to a claimant being able to accomplish a task "most of the time" is in my judgment to be read in its context as meaning that the claimant would normally be able to perform the stated activity if and when called upon to do so. Consistently with this, the possibility of pain and fatigue and the increasing difficulty of performing a given activity on a repeated basis must in my judgment be taken into account by considering how far the claimant's normal capabilities are impaired by comparison with those of a healthy person in normal working order. Even a fit man will suffer fatigue and his knees will start to ache if you make him walk up and down stairs many times in succession. The choice of descriptor should take into account whatever effects pain and fatigue may have on the claimant's ability to perform the task, so far as they are beyond the normal by reason of his specific disability. The words "most of the time" are not to be taken as giving rise to some need to try and calculate percentages of successful or failed attempts over any real or imagined period.

42. Nor in my judgment is there any ground for attempting any kind of quantitative assessment of the number of different working situations a claimant might be able to cope with. That would be going beyond the plain intention to focus only on the ability to perform the list of everyday tasks, as the yardstick for a common sense assumption that if a person is not seriously handicapped in these, there must be at least some kind of work he could do. Consideration of the requirements for specific jobs, and the kind of evidence that occupied so much time before tribunals under the old law, (with adjudication officers coming up with specimen job descriptions of very simple jobs that could be performed by anybody, and claimants coming up with detailed reasons why they thought them unsuitable) are now irrelevant.

Intermittent conditions and practical loss of earning capacity

43. There remains the question of whether under the new test there is any implied requirement of "practical employability", with particular reference to intermittent, fluctuating or unpredictable medical conditions that make normal employment impossible. Sporadic conditions such as multiple sclerosis, epilepsy, and Ménière's disease have an impact on earning capacity that was well recognised under the old law, and is hardly new. Yet except to the very limited extent noted above the all work test as it has emerged takes no account of the difficulties suffered by people who lose their earning capacity from conditions that attack in this way.

44. Despite the attractive arguments addressed to me for the claimants, it is I think inescapable that the legislation as it stands requires the all work test to be satisfied on a day by day basis for each individual day of claim before it can count as a "day of incapacity" and give rise to an entitlement to benefit. By requiring the test to be satisfied on a day by day basis but assuming (wrongly) that a constant measure of physical

disabilities can be got from the descriptor table, it thus largely ignores the problems of people who have "good days and bad days". If reg. 27 was viewed at any earlier stage as a satisfactory safety valve to mitigate the mechanical application of the rules, these two cases demonstrate that it is not.

45. I have been forced to the conclusion that people in the position of these two claimants have been deprived by the new regulations of the insurance cover the scheme formerly gave them, *ex post facto,* after meeting the conditions for a valid claim and after losing any chance of providing alternative cover for themselves. This result was described by Counsel for the adjudication officer as a "legislative omission", and I was not shown anything in the primary legislation or outside the wording of the new regulations themselves to indicate that it was the will of Parliament.

46. Omission or not, it is a matter of surprise and concern that cover should have been withdrawn from a whole class of people in this way, going well beyond what might fairly have been thought necessary to correct any individual laxity in the application of the previous conditions. I recommend therefore that the particular problems of people rendered practically unemployable by serious but intermittent conditions be reconsidered as a matter of urgency by the Secretary of State.

The task for a tribunal where the new test applies

47. Tribunals must therefore in my view approach these and similar cases as follows. Where the all work test applies, it must be satisfied on a day by day basis for each day of claim that is to count as a day of incapacity. In so applying it as regards any day, a broad and not a literal reading of the actual descriptors is to be adopted, so as to test a person's normal level of ability to carry out the specified activities as and when called on to do so, taking into account any additional limitations from pain, fatigue etc. compared with a normal person not suffering the disability but otherwise similar. Where a person suffers from an intermittent condition such that the test produces different answers for different days, the legislation does not at present permit an overall view to be taken over a continuous period. All relevant individual days of incapacity need therefore to be identified, so far as practicable over the period down to the tribunal's own decision so as to give the claimant and the adjudication officer as much guidance as possible on the proper entitlement under the new regulations.

48. This last part of the exercise may well involve the tribunal in making some rough and ready assessments on the best evidence they have available, and the answer will still be unsatisfactory for the claimants as they will dip in and out of entitlement according to the length and severity of the attacks of their condition and the number of days involved. The application of the minimum four day and maximum eight week requirements under s.30C will give rise to further anomalies. However a tribunal forced by the new regulations to ignore the fact of a continuous loss of earning power can at least ensure, in fairness to claimants deprived of a benefit they thought they had paid for, that those days when they are laid up in bed, unable to stand or otherwise on any view incapacitated by a sporadic condition are taken into account so far as can properly be done.

49. For the reasons given above I set aside the tribunal decision in each of these two appeals and refer each case to a fresh social security appeal tribunal sitting with a medical assessor in accordance with reg 21 of the Incapacity Regulations. I direct them to reconsider and redetermine each case in the way described above.

50. The two appeals are allowed accordingly.

(Signed)

P L Howell
Commissioner
21 March 1997