DERBY CITY COUNCIL

SOCIAL
SERVICES

Middleton House
27 St Mary's Gate
Derby DE1 3NS

Switchboard
01332 293111
Fax
01332 716767
Minicom only
01332 256666

Margaret McGlade
Director of
Social Services

Your Reference:

Our Reference:
JS/HPW

Date
7 September 1998

Contact:
Jane Smith

Telephone (01332) 716770 *Fax* (01332) 716774

Martin Barnes, Editor
Welfare Rights Bulletin
CPAG
1-5 Bath Street
LONDON
EC1V 9PY

Dear Mr Barnes

COMMISSIONER'S DECISIONS

Please find attached copies of two recent unreported Commissioner's decisions on Derby Incapacity Appeals which we think are useful.

CIB/16065/1996 deals with the weight to be given to the BAMS report.

The tribunal had preferred the evidence of the BAMS report because "it has been prepared by a person of expert standing and one who has no financial interest in the outcome of the appeal."

At paragraph eight, the Commissioner quoted our argument that if this approach was adopted then there would be little point in appealing and went on to quote approvingly CSDLA 856/1997 *39/98

> ". . . it would fly in the face of the obligation of the tribunal to consider the whole evidence in a case and in these circumstances they cannot accept one body of evidence upon a basis that it must normally prevail over other evidence in the case."

The tribunal must assess all the evidence in a case, without such automatic weightings.

CIB 898/97 deals with the descriptors relating to bending and kneeling. The Commissioner says at paragraph seven that:

> ". . . descriptor 6(C) applies if it is sometimes the case that a claimant cannot bend as if to pick up a piece of paper from the floor and straighten up again or if it is sometimes the case that a claimant cannot kneel as if to pick up a piece of paper from the floor and straighten up again. **It applies if the claimant can always bend but sometimes cannot kneel. It applies if the claimant can always kneel but sometimes cannot bend.**"

Enjoy.

Yours sincerely

Jane Smith
Welfare Rights Officer
Enc

See para 8 - treatment of title to be given to the ERP report. Copy - Jane.

HL/CW/CM/6

Commissioner's File: CIB/16065/1996

SOCIAL SECURITY ADMINISTRATION ACT 1992

SOCIAL SECURITY CONTRIBUTIONS AND BENEFITS ACT 1992

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

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Name: [redacted]

Social Security Appeal Tribunal: Derby

Case No: 4 14 96 02461

1. For the reasons given below this appeal by the claimant succeeds. A request made for an oral hearing of this appeal is refused as I am satisfied that the appeal can properly be determined without a hearing. In accordance with the provisions of section 23(7)(b) of the Social Security Administration Act 1992 I set aside the decision of the social security appeal tribunal given on 21 March 1996. I refer the case to a completely differently constituted tribunal for a fresh hearing and decision.

2. This case is about the claimant's entitlement to incapacity benefit, which depends on his capacity to work, which in turn depends on the application of the All Work Test. The test is defined in regulation 24 of the Social Security (Incapacity for Work) (General) Regulations 1995. The rules for satisfying the test are set out in regulations 25 and 26. The test itself is set out in the schedule to those regulations. In the present case, the claimant's capacity for work depends on whether he has scored at least 15 points for physical descriptors on the test. Mental health issues do not seem to be involved in this case and there appears to be no evidence that the claimant might be exempt from the All Work Test or come within one of the exceptions. Further details of the relevant law and the relationship between incapacity benefit and the All Work Test have been set out in the adjudication officer's submission to the original tribunal, of which all parties have copies. I do not propose to repeat what has been said in that document except insofar as is necessary to explain my decision.

3. The wording of the All Work Test has been amended with effect from 6 January 1997 by the provisions of SI No 3207 of 1996. I remind the tribunal that for any date prior to 6 January 1997 it is the previous wording of the test which is to be considered. The new tribunal should have before it a copy of the record of proceedings of the previous tribunal but must make its own finding of fact and reach its own decision. Nothing I say is to be taken as indicating one way or the other whether any particular descriptor does or does not apply.

4. The claimant was born 13 January 1940 and had worked as a taxi driver. As far as concerns the present appeal, he was certified as incapable of work from 26 November 1994 because of back pain. On 28 June 1995 he returned to the Benefits Agency or Department of Social Security form IB50, an incapacity for work questionnaire. On that form he indicated 6 areas of activity with which he had difficulty. Had his comments been taken at face value, his score on the All Work Test would have exceeded the 15 point threshold. He also indicated that he had an appointment to see a specialist on 29 June 1995 but I am bound to point out that at no stage during the course of these proceedings has any specialist report been produced. On 6 November 1995 the claimant was examined by Dr Barber on behalf of the Benefits Agency Medical Service. Dr Barber agreed with the claimant's comments in relation to difficulties in rising from sitting, standing, holding on when walking up and down the stairs and with bending and kneeling. Dr Barber disagreed with the claimant's comments in relation to his abilities to walk and sit. The adjudication officer considered the matter, accepted the opinion of Dr Barber, and decided that as from 14 December 1995 the claimant was no longer incapable of work because he had scored only 12 points on the All Work Test. On 12 January 1996 the claimant appealed to the social security appeal tribunal against the decision of the adjudication officer. The tribunal considered the matter on 21 March 1996 and confirmed the decision of the adjudication officer. It has been agreed by the claimant, Dr Barber, the adjudication officer and the tribunal that (whether or not a descriptor carrying points in any other field of activity applies) descriptors 5(c), 4(f), 2(d) and 6(c) all apply. These 4 descriptors each carry 3 points, making a total of 12. It is not necessary for me to make any further comments in relation to these descriptors. However, on 14 June 1996 the claimant applied for leave to appeal to the Social Security Commissioner against the decision of the tribunal. Leave was refused by the full-time chairman of the Independent Tribunal Service on 13 August 1996. The claimant now appeals by leave of Mr Commissioner Henty granted on 15 January 1997. The adjudication officer now concerned with the matter opposes the appeal and supports the decision of the tribunal.

5. There has been a great deal of argument in the submissions to the Commissioner in connection with the claimant's ability to walk. However, the claimant never suggested that his ability was so limited that any descriptor carrying more points than 1(e) applied. That descriptor carries 3 points. By virtue of regulation 26(2) of the 1995 regulations points cannot be awarded for descriptors in both activity fields 1 (walking) and 2 (stairs). Since 3 points had already been allocated in respect of descriptor 2(d) there would be no advantage in also establishing that 1(e) applied.

6. The real issue in dispute is over the claimant's ability to sit in an upright chair with a back but no arms. On form IB50 the claimant stated that he could not sit comfortably without having to move from the chair for more than 30 minutes. This would be descriptor 3(c) and would carry 7 points which, if added to the 12 points in respect of other descriptors, would take the claimant over the 15 point threshold. Dr Barber stated that he had observed the claimant sit in a chair with no arms for 40 minutes without moving. I observe that this would be consistent with descriptor 3(d) which carries 3 points and which would also take the claimant over the threshold. Dr Barber also recorded the claimant as having stated that he sits to watch TV and as a passenger in a car, bus or train for up to 3 hours at a time. However, in relation to sitting it is important always to remember that the test is whether the claimant can sit comfortably in an upright chair with a back but no arms. Most people do not watch television from this type of chair and the seats in most cars can be adjusted so that it is not necessary to sit in an upright chair. The chairman's note of evidence does not record any specific oral evidence to the tribunal in relation to the claimant's ability to sit. It does record a dispute over whether Dr Barber had accurately recorded statements made by the claimant in relation to his ability to walk.

7. The tribunal makes no specific findings in relation to the claimant's ability to sit other than to state that "in our view the adjudication officer was reasonable in accepting the opinion of the...doctor in the light of the observations and findings during the assessment". However, this is not the appropriate test. It might be that the adjudication officer did act reasonably in accepting the opinion of the doctor, but that does not necessarily mean that the adjudication officer was right to do so. The tribunal must consider the evidence itself and make its own findings. The issue in the present case is not whether the adjudication officer acted reasonably, but whether the claimant's ability to sit is covered by any of the relevant descriptors.

8. In its reasons, the tribunal states, "we pay particular regard to the contents of the medical report since it has been prepared by a person of expert standing and one who has no financial interest in the outcome of the appeal". Commenting

on this, the claimant's representative makes the very fair point that if this approach were to be adopted, there would be no point in appealing. I commend to tribunals the approach of the Commissioner set out in paragraph 11 of CSDLA/856/1997 (*39/98):-

> "11. For myself it seems to me that in any case what a tribunal is required to do when assessing the evidence in an appeal before them, including the evidence in the form of an examining medical practitioner's report, is to determine what evidence they accept and what evidence they reject so as to form the factual foundation of their decisions....I would not accept [the proposition that as a matter of course the examining medical practitioner's evidence must prevail]...it would fly in the fact of the obligation of the tribunal to consider the whole evidence in a case and in these circumstances they cannot accept one body of evidence upon a basis that it must normally prevail over other evidence in the case."

9. For the above reasons, this appeal succeeds.

(Signed) **H Levenson**
Commissioner

(Date) 23 June 1998