THE SOCIAL SECURITY COMMISSIONERS

Commissioner's Case No: CIB/17088/1996

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: [redacted]
Tribunal: [redacted]
Tribunal's Case No: [redacted]

Decision:

1. My decision is as follows. It is given under section 23(7)(b) of the Social Security Administration Act 1992.

1.1 The decision of the London East Social Security Appeal Tribunal held on 22nd May 1996 is erroneous in point of law: see paragraphs 14, 15, 21, 22, 35 and 37 below.

1.2 Accordingly I set it aside and, as it is not expedient for me to give a decision on the claimant's appeal from the adjudication officer's decision, I refer the case to a differently constituted tribunal for determination.

1.3 I direct the tribunal that rehears this case to conduct a complete rehearing and in particular:

The tribunal's jurisdiction begins on the effective date of the adjudication officer's decision under appeal: 19th January 1996. It ends on the day before the claimant was next found to be incapable of work: 3rd April 1996.

The tribunal shall consider the claimant's incapacity for the whole of the period within its jurisdiction in accordance with the Common Appendix to the decisions of the Commissioner in CIB/16092/1996, CIB/90/1997 and CIB/2073/1997.

The tribunal shall determine whether the adjudication officer has shown that the decision under appeal was correct as at its effective date. If the adjudication officer discharges this burden, the burden is on the claimant in order to establish incapacity from a later date.

The tribunal shall comply with my directions in paragraphs 21, 24 to 32, 36 and 38 below.

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 Credits and Income Support 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 completed on 25th September 1995, the claimant selected a descriptor only under the activity of remaining conscious. He selected the descriptor applicable to involuntary episodes of lost or altered consciousness at least once a month. However, he gave the dates of the last two episodes as being in June and August 1995, which does not support his selection of

descriptor. This descriptor carries 15 points. In addition, the claimant made comments in respect of the activities of walking and negotiating stairs, but without selecting any descriptor. The claimant has been diagnosed as having epilepsy.

5. A report was obtained from the claimant's GP in October 1995 which gave the date of the last episode as 4th June 1995. This did not support the claimant's date of August 1995.

6. The examining doctor saw the claimant on 12th December 1995. The doctor gave the opinion that the claimant was disabled in terms of the all work test only under the activity of consciousness and that the claimant had experienced at least two episodes of lost or altered consciousness in the previous 6 months. This descriptor carries 12 points. The doctor recorded fits as having occurred in June, August and November 1995.

7. On 19th January 1996, an adjudication officer decided that from and including that date the claimant was no longer incapable of work and not to be treated as incapable of work. The adjudication officer, on the basis of the opinion of the examining doctor, awarded 12 points on the all work test.

8. The claimant appealed to a tribunal against the decision of the adjudication officer. The letter of appeal was written by the claimant's local People's Rights organisation. It asserted that he had fits at least once a month and that he should have been awarded 3 points under the activity of negotiating stairs.

9. The claimant attended and gave evidence at the hearing of the appeal on 22nd May 1996, accompanied by a representative from People's Rights. The tribunal received a letter from the claimant's GP dated 27th February 1996. The letter stated that fits had occurred at the rate of one or two a month in 1994 and that the last recorded fit was in November 1995.

10. At the hearing the claimant's representative reported that the claimant had suffered a heart attack. The adjudication officer submission to the Commissioner reports that the claimant was found incapable of work from and including 4th April 1996.

11. The chairman's record of proceedings is not a model of clarity. Under the name of the representative it begins with what reads like the representative's submission, but then seems to shift into the claimant's own evidence without indicating the precise point of the change. The tribunal was told that the claimant had had two fits in the four weeks before 30th April (1996 presumably) and two fits since that date. Additionally the claimant had fits at night. He had fallen down the stairs during one fit. He had bladder problems in half of his fits.

The tribunal's decision

12. I am sorry to say that what should have been a straightforward decision is something of a mess. I have no confidence that I have before me the tribunal's decision. Normally I would have read the tribunal's record of decision as a whole in order to avoid some errors of law that would otherwise arise. However, given the state of the documentation before me it is not safe to take that approach.

13. The papers before me contain a record of decision bearing the relevant details of the claimant's appeal. It has not been signed. The only Box that has been completed by the chairman is Box 1, the tribunal's decision. The decision is recorded as the unanimous decision of the tribunal. Below in what is clearly the chairman's handwriting is written

> "Appeal fails. [The claimant] is incapable of work from 13/4/95."

This wording is repeated in the typed, but unsigned, copy of the notice of decision.

14. If that decision relates to the case before me, it is self-contradictory and wrong. The appeal could not have failed if the claimant was indeed incapable of work. Moreover, the effective date is wrong. The effective date of the decision under appeal was 19th January 1996, although the date from which the all work test became applicable to the claimant was 13th April 1995.

15. By reason of this confusion in the tribunal's decision, it is erroneous in law.

16. Between the manuscript and typed copies of the record of decision in the papers, there appear the notes of proceedings which clearly relate to the case before me, together with manuscript and typed copies of All Work Test Assessment Schedules bearing the claimant's name and register number but listing descriptors carrying 16 points. They have been marked, by whom I know not, as not applicable to "this case".

17. The typed record of decision shows the decision as being a majority one and not unanimous. This is confirmed by the reasons for decision which include reasons for dissent.

The activity of consciousness

18. The majority confirmed the adjudication officer's selection of descriptor under this activity. They did so on the basis of the evidence of the dates of fits during the day. The majority recorded that they "had a little difficulty accepting [the claimant's] version of events." I take that to mean that they accepted the evidence of the precise dates that had been given, but did not accept the assertion of monthly fits because that did not accord with the dates given. That conclusion on the evidence is unassailable in law, although it will be open to the tribunal that rehears this case to reach a different decision as a matter of fact.

19. As regards the fits by night, the majority decided that they were not relevant because

> "nocturnal seizures did not constitute lost or altered consciousness because [the claimant] did not wake up when he had a fit. He would only know he had had a fit at night because he would, for example, find himself on the floor."

20. The adjudication officer, in response to a direction by a Nominated Officer, submitted that nocturnal fits should not be taken into account because the activity, as defined at the time, "excludes any episode which occurs during a period of normal sleep." I reject that submission.

21. The governing terms of the activity of consciousness as defined at the relevant date by paragraph 14 of the Schedule to the Social Security (Incapacity for Work) (General) Regulations 1995 were:

> "Remaining conscious other than for normal periods of sleep."

The word "normal" qualifies "periods" and not, as in the adjudication officer's submission, "sleep". An epileptic fit must be an involuntary episode of lost or altered consciousness. It is nonetheless so because its onset occurs when the claimant is asleep. The fact that the claimant is experiencing such a seizure prevents the period of sleep being "normal". This is a matter of fact, not law, but it was the only conclusion open to a tribunal. Nocturnal seizures are not, therefore, excluded from this activity by its governing words.

22. The decision of the majority is, therefore, erroneous in law on this aspect of the appeal.

Directions on the activity of consciousness

23. I direct the tribunal that rehears this case to investigate the frequency of the claimant's epileptic fits by day and by night. Having done so, the tribunal shall apply the descriptors in accordance with the guidance in paragraphs 24 to 31 below.

24. Only descriptors (a) to (f) carry points under the all work test. Those descriptors take two forms. Descriptors (a), (b) and (c) apply where a claimant "has" an involuntary episode of lost or altered consciousness with specified frequency, defined as least "once" in "a day", "a week", or "a month". Descriptors (d), (e) and (f) apply where a claimant "has had" at least a specified number of such episodes in a particular period "before the day in respect to which it falls to be determined whether he is incapable of work".

Descriptors (d) to (f)

25. Descriptors (d) to (f) look to the past. Hence the use of the words "has had".

26. The tribunal must consider the possible application of those descriptors from the effective date of the adjudication officer's decision for the whole of the period within its jurisdiction. See the decisions of the Tribunal of Commissioners in CIB/14430/1996, CIS/12015/1996 and CS/12054/1996 and paragraphs 25, 40 and 41 of the Common Appendix to the decisions of the Commissioner in CIB/16092/1996, CIB/90/1997 and CIB/2073/1997.

27. The tribunal must consider the possible application of these descriptors on a day by day basis. This is unavoidable. It follows inexorably from the combined effect of the down to the date of decision principle and the provisions of section 30C(1) of the Social Security Contributions and Benefits Act 1992. If at any time within the period of the tribunal's jurisdiction the claimant has had the specified number of fits in the particular period immediately before any date, the claimant falls within the relevant descriptor from and including that date.

28. The interpretation of the activity of consciousness and in particular descriptors (d) to (f) was considered in the decision of the Commissioner in CSIB/597/1997. The Commissioner reached a different conclusion from that set out in paragraph 27 above. I respectfully disagree with the Commissioner's reasoning. I am surprised to see a decision of my own called in aid of the Commissioner's interpretation: CIB/911/1997. The Commissioner refers to that decision as endorsing what he calls a "more general approach" to these descriptors. The relevant part of the decision was concerned with the interpretation and application of the word "cannot" under some of the activities. The point that I was making was that this was an ordinary English word that did not need to be defined as a matter of law, but merely had to be applied by the tribunal as the finder of facts. I directed the tribunal to consider the claimant's position overall in order to decide whether as a proper use of language it might fairly be said that the claimant "cannot" perform the activity in question. I have repeated this direction regularly, most recently in CIB/6244/1997, paragraph 16 and in paragraph 36 below. It is, as I understand it, the standard approach to be taken to the application of ordinary English words that do not have a particular definition in law: see the decisions of the Commissioners in R(A) 2/74, paragraph 35 and R(SB) 38/85, paragraph 21. This approach has no application to the activity of consciousness where the word "cannot" is not used. It cannot be called in aid to override the clear wording used in descriptors (d) to (f).

29. In CSIB/597/1997, paragraph 11, the Commissioner held that the down to the date of decision principle normally only required a tribunal to consider the application of these descriptors at two dates: the effective date of the decision and the date of the hearing. With respect, I disagree. The wording of the descriptors does not refer to the period "before the day on which it falls to be determined whether he is incapable of work". The wording refers to the period "before the day in respect to which it falls to be determined whether he is incapable of work". Given the down to the date of decision principle as it works in conjunction with section 30C(1), every day within the

tribunal's jurisdiction is a day "in respect to which it falls to be determined whether he is incapable of work".

Descriptors (a) to (c)

30. Descriptors (a) to (c) look not to the past but to the present. Hence the use of the word "has" in contrast to the words "has had" in descriptors (d) to (f).

31. The structure of these descriptors is also different. They are not defined by reference to a specified number of fits in a particular period before a date. They are defined by reference to a specified frequency. That frequency is set by reference not to a particular period before a date, but in the more general terms of once a day, week or month. In order to fall within these descriptors, it is necessary for fits to occur at the relevant frequency. Frequency is not established by proving that a fit occurred once in, say, a particular month. The claimant must prove that at a particular time fits are occurring at least once a month. This requires the tribunal to consider a period longer than one month (or day or week, as appropriate) in order to bring the claimant within one of these descriptors. It is not possible to specify what that period should be. The tribunal must use a period of time that fairly represents the claimant's disability at any particular time. The tribunal must begin by considering the case as at the effective date of the decision under appeal and select a period accordingly. It must then consider if the evidence shows that there has been a change in the frequency after that date. The periods to be considered in making these decisions can only be determined as a matter of common sense on the basis of the evidence available in the circumstances of an individual case.

The activity of continence

32. It is asserted that the claimant is incontinent in half of his fits. The tribunal that rehears this case must investigate this in order to decide which descriptor under this activity applies.

The activity of stairs

33. The claimant argued for points under the activity of stairs, because he needed to hold on for safety lest he have a fit while on the stairs.

34. The majority of the tribunal rejected this argument on the ground that the claimant had

> "no difficulty in physically climbing stairs and the Tribunal did not feel that this was a matter which they could take into account in relation to the descriptors."

35. The majority's decision was erroneous in law for rejecting safety as a relevant factor to be taken into account. The wording of the activity of negotiating stairs and of the descriptors under this activity do not limit consideration to the use of the limbs. In the decision of the Commissioner in CSIB/13/1996, paragraph 16, it was held that

defective vision could be considered in the application of the descriptors. There is no difference in principle between the risk to safety from defective vision and the risk to safety from an epileptic seizure.

36. The significance of the risk of a fall is to be considered in accordance with the guidance I gave in the decision bearing Commissioner's file number CIB/6244/1997, paragraph 16. I held that the use of the word "cannot" in descriptors

> "does not mean that they only apply where it is impossible for the claimant ever to perform the activity specified. The claimant's position must be considered overall in order to decide whether as a proper use of language it may fairly be said that he "cannot" perform the activity."

I direct the tribunal that rehears this case to follow this approach when considering the activity of negotiating stairs.

The need for a review

37. The tribunal did not consider whether the adjudication officer should have reviewed the previous decision determining the claimant's incapacity for work. The tribunal is not to be criticised for this, because the law on this complex area was only clarified after the hearing of the appeal in the Common Appendix to the decisions of the Commissioner in CIB/16092/1996, CIB/90/1997 and CIB/2073/1997. Nonetheless those decisions operate retrospectively to render the tribunal's decision erroneous in law for failing to investigate and determine this question.

38. I direct the tribunal that rehears this case to investigate in order to determine whether a review is required in accordance with the law as stated in the Common Appendix.

39. If a review is necessary but has not been carried out, the omission is one of substance and not of form. However, the tribunal that rehears this case should itself deal with the issue by carrying out a review and, if appropriate, giving a revised decision on incapacity. The tribunal should not merely declare the adjudication officer's decision to be of no force or effect and leave it to the adjudication officer to give a decision in proper form. See paragraph 31 of the Common Appendix.

Conclusion

40. The tribunal's decision is erroneous in law and must be set aside. It is not appropriate for me to give the decision that the tribunal should have given on its findings of fact and it is not expedient for me to make further findings of facts. There must, therefore, be a complete rehearing of this case before a differently constituted tribunal. The tribunal will decide afresh all issues of fact and law on the basis of the evidence available at the rehearing in accordance with my directions in paragraph 1.3

above. As my jurisdiction is limited to issues of law, my decision is no indication of the likely outcome of the rehearing, except in so far as I have directed the tribunal on the law to apply.

Signed: **Edward Jacobs**
Commissioner

Date: **28th October 1998**