

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. My decision is that the decision of the tribunal is erroneous in point of law. I set aside the tribunal's decision and, since it is not expedient for me to make the findings of fact which are necessary to decide what decision the tribunal should have given, I refer the case for re-hearing to a differently constituted tribunal.
2. The claimant was rendered totally blind in his right eye as a result of an accident in about 1976. He also came to suffer from migraine attacks and from impaired vision in his left eye, and on 1 February 1996 he made a claim for incapacity credits, saying to the examining medical officer who examined him on 24 June 1996 that he went everywhere with his wife because of his vision problems. He was initially awarded only 8 points in respect of impaired vision, but on an appeal against that decision he was held to satisfy the all work test (as it then was) on the basis of an award of 15 points for descriptor 12(c) (cannot see well enough to read 16 point print at a distance greater than 20 centimetres).
3. The claimant completed a further incapacity for work questionnaire on 13 December 2000, claiming that he now suffered from severe migraines and from tinnitus, that he was unable to walk up and down stairs unless they were well lit and provided with a handrail, and that he could not hear well enough to understand someone talking in a normal voice on a busy street. He again stated that he did not go out without his wife because of the problems with his sight. The examining medical officer who examined the claimant on 2 May 2001 recorded that the claimant suffered from tinnitus and carried out what seems to have been a 'whisper test' of the claimant's hearing, but he assessed the claimant as scoring no points under the personal capability assessment. On the basis of that assessment, a decision was made on 30 September 2001 that the claimant was not entitled to incapacity credits from that date. The claimant appealed against the decision on 11 October 2001 and on a reconsideration carried out on 21 November 2001 the claimant was awarded 8 points in respect of descriptor 12(e) (cannot see well enough to recognise a friend across the road at a distance of at least 15 metres). Since that score was still less than the 15 points required to satisfy the personal capability assessment, the appeal proceeded to a hearing on 15 March 2002.
4. The tribunal upheld the award of 8 points in respect of descriptor 12(e) and awarded a further 3 points in respect of descriptor 2(d), on the basis that the claimant's impaired vision required him to hold onto the handrail when walking up and down stairs. However, they awarded the claimant no points in respect of activity 11 (hearing with hearing aid or other aid if normally worn) for the following reasons:

"We did not accept that the tinnitus caused a hearing problem within the descriptors. The appellant's evidence to us was that, at the hearing, the level of noise in his ears was the same as normal but that he could not only hear us talking in normal voices but was able to hear his wife on Tottenham Court Road, a busy large street. As his condition today was normal for him, we consider that on his own evidence, he does not satisfy any of the hearing descriptors."

5. In his appeal to the Commissioner the claimant made a number of complaints about the conduct of the hearing and also contended that the tribunal ought to have considered mental disabilities, but when granting leave to appeal on 29 July 2002, I did so on the basis that it was arguable that the tribunal were wrong in basing their decision on descriptor 11(e) on the claimant's ability to hear what his wife was saying to him in a busy street. In a submission dated 29 August 2002, the Secretary of State's representative opposed the appeal. The claimant instructed solicitors to prepare representations in reply to the Secretary of State's submission, and I am grateful to the claimant's solicitors for their very well argued written submission of 30 September 2002.
6. The evidence referred to by the chairman in the passage from the statement of reasons set out above was given in answer to a question by the tribunal, and the claimant contends that what he actually said was that he could not understand what his wife was saying on a busy street. I can find no reason to doubt the accuracy of the passage in the Record of Proceedings (which has helpfully been transcribed), recording the claimant's evidence as: "able to hear wife outdoors today, normal voice", but I consider that it is unnecessary to decide that issue because I have come to the conclusion that the tribunal erred in law in holding that the claimant did not satisfy descriptor 11(e) on the basis of the evidence recorded in the Record of Proceedings.
7. Descriptor 11(e) applies to a claimant who :

"cannot hear well enough to understand someone talking in a normal voice on a busy street".

The Secretary of State's representative has submitted that the tribunal were entitled to rely on the claimant's answer to their question as evidence that he could hear what someone was saying on a busy street, but that overlooks the fact that descriptor 11(e), in common with other Activity 11 descriptors, tests hearing impairment in terms of the ability to understand, and not just hear, speech in the prescribed conditions. In *CIB/590/1998* (*1/1999) Mr Commissioner Angus held that descriptor 11(e) has to be considered in the light of what is reasonable, and that it is not reasonable to say that a claimant can understand someone talking in a normal voice in a busy street if he can gain that understanding only by making frequent requests for repetition of what has been said. If tinnitus affects a claimant's ability to discriminate between speech sounds and therefore makes it more difficult for the claimant to understand what is being said, it must, in my judgement, be taken into account when applying the Activity 11 descriptors which test the ability to understand speech in different conditions. It is not clear what the tribunal meant by the phrase "a hearing problem within the descriptors", but there is no reference in the statement of reasons to the claimant's ability to understand speech. I therefore consider that the tribunal did not make the findings of fact which were necessary in this case and that, accordingly, their decision was erroneous in point of law.

8. It may be that by "hear" the tribunal meant "understand", but if that was the case I agree with the claimant's representative that that did not provide a basis for holding that descriptor 11(e) did not apply. The claimant's wife was also his guide when he was out of doors, and he could be expected to understand her much better than he

could understand other persons talking in a normal voice in the same conditions. If a claimant's ability to understand someone with whom the claimant is familiar is taken into account, a much higher level of disability may be necessary for descriptor 11(e) to apply. That would result in inconsistency in applying the descriptor, and I therefore agree with the claimant's representative that descriptor 11(e) should be considered by reference to a claimant's ability to understand a person with whom the claimant is not familiar.

9. I therefore allow the appeal and, since I am not in a position to make the findings which are necessary to determine whether the claimant remains entitled to incapacity credits, I refer the case for rehearing to a differently constituted tribunal. The new tribunal will need to consider again all the activities in issue. In relation to Activity 2 (walking up and down stairs), I consider that the tribunal under appeal were correct to follow *R(IB)3/98* in preference to unreported decision *CIB/16991/1996*, and that the new tribunal should therefore apply descriptor 2(d) if they are satisfied that the claimant's loss of vision prevents him from walking up and down stairs without holding the handrail. The claimant must understand that he can only claim in respect of mental descriptors if he is suffering from some specific mental illness or disablement and, if that is his case, he must provide the evidence necessary to establish it to the tribunal's satisfaction.
10. The application of the personal capability assessment to this claimant has resulted in scores ranging from 15 points, awarded by the tribunal which heard the first appeal, to 0 points, awarded by the second examining medical officer. I therefore direct that the case be referred to a district chairman before it is re-listed, so that consideration can be given to the need for any additional medical reports. The claimant has now provided a letter from his general practitioner stating that his tinnitus became very severe in 1997, and that he now under the care of an ENT consultant. The letter also states that the claimant is being treated at Moorfields Eye Hospital. Consideration should be given to arranging for a report from the ENT consultant on the issue of whether the claimant's tinnitus affects his understanding of speech, and also a report from Moorfields Eye Hospital on the extent to which the claimant's eye disabilities impair his useful vision.

(Signed) **E A L Bano**
Commissioner

28 January 2003