THE SOCIAL SECURITY COMMISSIONERS

Commissioner's Case No: CIB/3985/2001

SOCIAL SECURITY CONTRIBUTIONS AND BENEFITS ACT 1992

SOCIAL SECURITY ADMINISTRATION ACT 1992

SOCIAL SECURITY ACT 1998

APPEAL FROM A DECISION OF AN APPEAL TRIBUNAL ON A QUESTION OF LAW

DECISION OF THE SOCIAL SECURITY COMMISSIONER

MR COMMISSIONER JACOBS

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. My decision is as follows. It is given under section 14(8)(b) of the Social Security Act 1998.

1.1. The decision of the Manchester appeal tribunal, held on 1st August 2001, is erroneous in point of law.

1.2. I set it aside and remit the case to a differently constituted appeal tribunal.

1.3. I direct that appeal tribunal to conduct a complete rehearing of the issues that arise for decision. In particular, the tribunal must determine the claimant's capacity for work from and including 26th March 2001. In doing that:

The appeal tribunal must not take account of circumstances that were not obtaining at the date of the decision under appeal: see section 12(8)(b) of the Social Security Act 1998, as interpreted in *R(DLA) 2 and 3/01*.

If there is variation in the claimant's disabilities, the appeal tribunal must apply the approach laid down by the Tribunal of Commissioners in *R(IB) 2/99*.

Before this case is listed for rehearing, it must be put before a legally qualified panel member to consider whether it is necessary or appropriate to give directions under regulation 38(2) of the Social Security and Child Support (Decisions and Appeals) Regulations 1999. In particular, the panel member will need to give directions for the Secretary of State to provide the previous assessments of the claimant's capacity for work and, perhaps, to make a further submission on their relevance.

The appeal to the Commissioner

2. This is an appeal to a Commissioner against the decision of the appeal tribunal brought by the claimant with the leave of a district chairman. The Secretary of State does not support the appeal.

The issue

3. The issue in this case is whether the tribunal should have obtained and considered the evidence of the claimant's previous assessments for the all work test or personal capability assessment. The claimant's grounds of appeal raise other issues, but I have not considered them. Any error that did arise on the facts, will be subsumed by the rehearing.

4. It is no longer necessary as a matter of law for an appeal tribunal in every case to have before it and to consider the previous assessments of the claimant's capacity for work. However, that may be necessary in the circumstances of the case. There are two reasons why the tribunal should have considered the earlier assessments in this case.

A fair hearing – natural justice and equality of arms

5. First, the claimant argued that his condition had not changed and that the Secretary of State had not given sufficient weight to the history of the condition.

The Secretary of State's argument

12. The Secretary of State argues that the tribunal was entitled, but not required, to consider the earlier evidence. I reject that argument. The tribunal had a power to adjourn for the evidence to be produced. A power does not confer a duty. But the circumstances of a case may be such that there is only one proper exercise of that power, so that any other exercise of it is an error of law.

Conclusion

13. In the circumstances of this case, the tribunal should have adjourned the hearing for the evidence of the earlier assessments to be produced by the Secretary of State. Its failure to adjourn deprived the claimant of a fair hearing.

Summary

14. The tribunal's decision is wrong in law and must be set aside. A rehearing is necessary, because the evidence of the earlier assessments must be considered. That assessment will benefit from the experience of the medically qualified panel member at the rehearing.

Signed on original

Edward Jacobs
Commissioner
22nd January 2002

6. A claimant has to have a fair hearing. That has always been a requirement of natural justice. It is also now part of a claimant's Convention right under Article 6(1) of the European Convention on Human Rights and Fundamental Freedoms. Part of that right requires the tribunal to follow a procedure that ensures equality of arms between the claimant and the Secretary of State. That means that it must maintain a fair balance between the parties: see the decision of the European Court of Human Rights in *Dombo Beheer BV v The Netherlands* (1993) 18 European Human Rights Reports 213 at paragraph 33.

7. The tribunal had to consider relevant issues raised by the claimant. In this case the claimant raised the issue of the continuity of his disablement. He identified evidence that he considered relevant to that issue. He could not produce it himself, because it was held by the other party to the proceedings, the Secretary of State. The Secretary of State did not produce that evidence. The only way that the claimant could obtain it was by direction of the tribunal. The tribunal refused to obtain it, because

> 'The Tribunal was satisfied that there was sufficient evidence to make a decision in this case, having got a detailed medical report.'

That report must be the examining doctor's report.

8. The tribunal had in effect, if not in so many words, a request by the tribunal to adjourn and direct the Secretary of State to produce the earlier assessments. The tribunal had to decide whether that evidence was potentially relevant. In some circumstances a later report may show that an earlier report is not relevant. It might, for example, show a significant change, like an operation or a new injury. However, there was nothing of that kind in the examining doctor's report in this case. If the evidence was relevant, the tribunal should have adjourned for the evidence to be produced, unless the claimant was to blame for the evidence not being available: see the decision of the Court of Appeal in *R v Medical Appeal Tribunal (Midland Region), ex parte Carrarini* reported with *R(I) 13/65*.

9. The fact that the earlier assessments were not available was in no way the fault of the claimant. He had referred to the history of his illness in his letter of appeal. Despite that, the Secretary of State had not included the earlier evidence in the submission to the tribunal. The only issue was relevance. The tribunal's reason, however, does not deal with that. Rather, it begs the question, by accepting as accurate and sufficient the report which, on the claimant's argument, the other evidence would show to be incomplete and insufficient. The flaw in the tribunal's reasoning is self-evident.

Variability

10. The second reason why the tribunal should have obtained the evidence of previous assessments is that the claimant's condition was variable. This was acknowledged by the decision-maker on page 47. If a claimant's condition is variable, the examination may reflect the claimant's condition at the time, but not give an accurate overall picture. Assuming that the claimant's condition has not improved, the variation in that condition is better viewed over a series of assessments.

11. The tribunal's explanation that it had a detailed medical report did not justify its refusal to obtain the earlier assessments, because it did not deal with the issue of variation and the relevance of variation to that.

1. My decision is that the decision of the tribunal held on 23 March 2001 is erroneous in law. I set it aside. I substitute my own decision namely that the claimant remained incapable of work from and including 7 August 2000.

2. The claimant became incapable of work in February 1997 on the grounds of his low back pain. He received statutory sick pay and then incapacity benefit. He satisfied a personal capability assessment in April 1999. He was required to undergo a further personal capability assessment in July 2000. Following that assessment the decision maker decided that the claimant only scored 12 points on the personal capability assessment, that he was no longer incapable of work and that his award of incapacity benefit should be superseded from 7 August 2000. The claimant appealed. The tribunal with which I am concerned sat on 23 March 2001, a previous tribunal having adjourned. That tribunal disallowed the appeal and confirmed the award of 12 points, namely, three points each in respect of sitting, rising from a chair, bending and kneeling, walking and walking up and down stairs (in the case of the last two activities since each was only scored three points, only one counts). The claimant appealed with the leave of a chairman.

3. The claimant's representative requested an oral hearing which was granted. At the oral hearing the claimant attended and was represented by Mr Andrews of a local Welfare Rights Service. The Department was represented by Mr James, Solicitor. I am grateful to them for their submissions.

4. The sole matter in issue was the tribunal's treatment of the descriptor of standing upon which the tribunal found the claimant scored no points. It was accepted before me that the tribunal fell into error in as much as it considered whether the claimant could stand without having to move around, but had not properly considered whether the claimant could stand without having to sit down. As was explained in CSIB/60/96 it is necessary when the standing activity is in issue to consider both the requirement to move about and the requirement to sit down. This the tribunal, it was agreed before me, did not fully do.

5. The submission on behalf of the claimant was to the effect that standing meant standing stock still. I do not accept this. Except for those engaged in military activities no normal person (to whom regard has to be had when analysing the activities and the descriptors) stands stock still for any length of time. Anybody who stands for any period (for example when football was watched from terraces or when waiting for a procession to pass) will move to a certain degree on or about the spot where he is. There was considerable argument before me about what movement was necessary to count. Each of the descriptors contains the phrase "cannot stand for more than a [period of time] before needing [to sit down] [to move around]". In my judgment the best guidance to tribunals that I can give is that concentration be placed upon the necessity for the claimant either to move around (that is away from the spot he is standing on) or to sit down after he has been standing. The quasi-involuntary movements that most people make in standing for prolonged periods do not, in my judgment, count. Instead the tribunal should concentrate on how long a claimant can stand before needing or having to move around or sit down (usually because of pain in the back or legs).

6. The claimant's representative asked that I substitute my own decision. Mr James submitted, not particularly enthusiastically, that the case should be remitted to a new tribunal. I consider that the evidence before me entitles me to substitute my own decision. On the IB50 questionnaire received on 22 June 2000 the claimant stated that he had no problem

standing, but qualified this by saying "if I stand on the same spot for about 10 to 15 minutes my back would start to ache and I would have to sit down". The BAMS doctor noted that the claimant said that he ironed for about an hour standing and agreed with the claimant that the claimant had no problems with standing: the doctor did not, apparently, consider the qualification the claimant had made. That doctor did, however, identify that the claimant always had some lower back pain, which occasionally became more acute with sciatica. She further noted, when considering the mental health descriptors (no longer in issue) that the claimant was frustrated by the limitations imposed on his activity by his back pain. Before the adjourned tribunal he gave evidence (in connection with the doctor's note that he ironed for one hour standing) that he moved about when he was ironing, that he ironed his own tee shirts and that he sat down during the hour because of pain. His own doctor stated that the claimant could not be required to stand for any lengthy periods. The tribunal with which I am concerned fastened on the statement made to the examining doctor to the effect that the claimant could stand for one hour while doing the ironing and simply found that this statement was incompatible with his having to sit down and that the movements the claimant made while ironing did not constitute moving around: it did not address the question of "needing to". I consider the tribunal took too harsh a view of the claimant's evidence to the examining doctor and did not fully consider whether during a session of one hour's ironing the claimant would need to move around or sit down because of his back pain. I consider that the totality of the evidence including (i) the qualification on the original IB50, (ii) the examining doctor's findings that the claimant had persistent back pain which occasionally became acute, (iii) the claimant's own GP's evidence that the claimant could not stand for prolonged periods (iv) the claimant's own statement to both tribunals that he needed to sit down and (v) the second tribunal's own finding that the claimant moved about when ironing entitled the claimant to be treated as satisfying either descriptor 4(d), namely cannot stand for more than 30 minutes before needing to sit down (in which case he would attain a further 7 points) or descriptor 4(f) that he could not stand for more than 30 minutes before needing to move around (a further 3 points), on the grounds of back pain. In either event the claimant would gain the necessary further 3 points in addition to those awarded by the tribunal to obtain a total of 15 points and accordingly satisfies the personal capability assessment.

7. My decision is therefore as given in the first paragraph above

(Signed) **A Lloyd-Davies**
Commissioner

(Date) 20 December 2002