HL/TC/RC

THE SOCIAL SECURITY COMMISSIONERS

Commissioner's Case No:CIB/4981/1997

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

MR COMMISSIONER LEVENSON

Claimant	:	Walter Roby
Tribunal	:	Wigan
Tribunal Case No	:	617 96 12770

Conflicting medical evidence.
- Tribunal should make its own findings of fact
- BMS doctors not inherently better placed than other doctors.

(WKB 1507.

1. For the reasons given below this appeal by the claimant succeeds. In accordance with the provisions of section 23(7)(b) of the Social Security Administration Act 1992 I set aside the decision made by the social security appeal tribunal on 4 September 1996. I refer the matter to a completely differently constituted tribunal for a fresh hearing and decision.

2. This case concerns the claimant's capacity to work, which 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, and there appears to be no evidence that the claimant might be exempt from the test or come within one of the exceptions. Further details of the relevant law and the relationship between the All Work Test and entitlement to incapacity benefit have been set out in the adjudication officer's original submission to the tribunal, of which all parties have copies. I do not propose to repeat what has been set in that document except insofar as is necessary to explain my decision.

3. The claimant was born on 21 April 1948. He had worked as an ambulance driver but, so far as concerns the present appeal, he was certified as incapable of work from 27 January 1994 because of cervical spondylosis. Subsequently he was also diagnosed as suffering from chronic back pain. On 31 January 1996 he completed form IB50, an incapacity for work questionnaire. Had his comments on the form been taken at face value, his score would have exceeded the 15 point threshold. On 11 April 1996 the claimant was examined by Dr Spielmann on behalf of the Benefits Agency Medical Service. The claimant had indicated on form IB50 that he could not sit comfortably for more than 30 minutes without having to move from the chair. Dr Spielmann was of the opinion that there was no problem with sitting. On examination he reported a full range of movement of the lower back and of both hip and knee and ankle joints. The lower part of the leg was tender on palpation. Bending the head forward lacked 25%. Bending it backwards lacked 50%. Turning the head to the right or left lack 25% to either side. The claimant had stated that he could not stand for more than 10 minutes without having to move around nor for more than 30 minutes without having to sit down. Dr Spielmann was of the opinion that the claimant could stand for up to 30 minutes before needing to move around. The claimant had indicated that he could not walk more than 200 metres without stopping or severe discomfort. Dr Spielmann was of the opinion that the claimant could walk more than 400

metres without stopping or severe discomfort. In relation to reaching, the claimant had not indicated that any descriptor applied which carried points. However, Dr Spielmann was of the opinion that the claimant could not raise his right arm above the horizontal. This would be descriptor 9(e) carrying 6 points. The claimant had made other comments on form IB50, but none of them would have constituted any other descriptors carrying points. The adjudication officer considered the matter, accepted the assessment of Dr Spielmann, and decided that from and including 19 April 1996 the claimant was no longer incapable of work and therefore no longer entitled to incapacity benefit. The adjudication officer allocated 9 points, which was below the 15 point threshold. On 24 April 1996 the claimant appealed to the tribunal against the decision of the adjudication officer. He submitted to the tribunal two reports from Mr M S Bell FRCS, a Consultant Orthopaedic Surgeon. These reports were dated 11 January 1995 and 2 August 1996 (the latter date being the date of an examination by Mr Bell). Because of the date the former report can be disregarded in this case. However, the latter report dealt with the medical history and results of examination. Mr Bell was of the opinion that "sitting is restricted to less than 15 minutes, walking to less than 200 metres, standing to less than 15 minutes...". If these opinions were correct, the relevant descriptors would carry 7 points each, making a total of 21 points apart from any points allocated in respect of limitations on reaching.

4. The tribunal met to consider the matter on 4 September 1996. Apart from recording the history of the claim, the only findings of fact made by the tribunal were that cervical spondylosis is causing problems with standing and reaching, that the claimant takes ibuprofen and two aspirin twice a day, that he has "no physio" and that he "wears collar only occasionally". The tribunal confirmed the decision of the adjudication officer and in the reasons for its decision explained that the clinical findings of Mr Bell and Dr Spielmann were very similar but "we consider that the medical officer [Dr Spielmann] by the nature of his experience and training is best able to assess the appropriate descriptor". The tribunal accepted that the spondylosis caused pain and that the medical assessor had indicated that this was likely to be aggravated by prolonged standing but would not normally affect walking or sitting. It also recorded that the claimant "sat in front of us for over 30 minutes, without apparently too much discomfort, although he told us afterwards that he felt terrible".

5. The claimant applied for leave to appeal to the Social Security Commissioner against the decision of the tribunal. Leave was refused by a full-time chairman of the Independent Tribunal Service on 30 June 1997. The claimant now appeals by leave of Mr Commissioner Sanders given on 27 October 1997.

The adjudication officer now concerned with the matter opposes the appeal and supports the decision of the tribunal.

6. The claimant has formulated his grounds of appeal in various different ways. One of the grounds is stated to be that the tribunal acted in breach of the rules of natural justice. However, this is a misdescription of what the claimant complains of. The complaint is that the tribunal preferred the evidence of Dr Sielmann to that of Mr Bell for "spurious and unfounded reasons".

7. The reasons why I allow this appeal are because of the paucity of findings of fact made by the tribunal, the contradictory statement in the reasons as to the effect of the claimant sitting in front of the tribunal for over 30 minutes, and the failure of the tribunal to make its own decision in relation to whether any particular relevant descriptor did or did not apply. What the tribunal has done is to consider the opinion of two doctors as to which descriptors might apply and decided between them. This is not an appropriate way to approach its task, and the reasons given for preferring the opinion of Dr Spielmann are inadequate. The tribunal should have made primary findings of fact based on the evidence in relation to each relevant activity area (as defined in column 1 of the schedule to the regulations) and on the basis of such findings decided for itself which descriptor or descriptors apply. It is totally improper to assume that a doctor examining the claimant on behalf of the Benefits Agency Medical Service is any more likely to be correct than any other doctor, merely because he is employed by the Benefits Agency Medical Service, especially in relation to a doctor who is a Fellow of the Royal College of Surgeons and a consultant orthopaedic surgeon.

8. Because there are primary facts to be established from conflicting evidence, it is not expedient that I substitute my own decision. For that reason I have referred the matter for a fresh hearing. The claimant must not assume from this that the tribunal will eventually find in his favour. I have allowed the appeal because the previous tribunal did not set about its task in the proper way. It will be open to the new tribunal to decide on the basis of the evidence that is before it, some of which I have referred to above, what the appropriate decision is.

9. However, for the above reasons this appeal by the claimant succeeds.

(Signed) H Levenson
Commissioner

(Date) 13 October 1998