



**THE SOCIAL SECURITY COMMISSIONERS**

*Commissioner's Case No: CIB/5901/97*

**SOCIAL SECURITY ADMINISTRATION ACT 1992**

**APPEAL FROM THE SOCIAL SECURITY APPEAL TRIBUNAL UPON A  
QUESTION OF LAW**

**DEPUTY COMMISSIONER: ALAN J GAMBLE**

*Appellant:*

*Respondent: Adjudication Officer*

*Tribunal: Manchester*

*Tribunal Case No: 6/14/96/23784*

## DECISION OF SOCIAL SECURITY COMMISSIONER

1. My decision is that the decision of the Manchester social security appeal tribunal of 4 February 1997 is erroneous in law. I set it aside and remit the case to a freshly constituted social security appeal tribunal, sitting with a medical assessor, for redetermination.

2. The claimant claimed incapacity for work on 15 March 1996. Her stated cause of incapacity was bronchial asthma and backache. In the circumstances of her case, the All Work Test was applicable to the claimant from the said date. She was sent out the relevant questionnaire by the Department. She returned it. Her general practitioner also returned the MED4 form to the Department. Thereafter the claimant received a BAMS medical examination. On receipt of the report of that examination, an adjudication officer held on 3 July 1996 that the claimant was not incapable of work as from 15 March 1996 given that he had awarded the claimant zero points under the physical and mental descriptors of the All Work Test. The claimant appealed against that decision to the tribunal. In the circumstances described in detail in paragraph 4 below, the claimant neither attended the hearing before the tribunal nor was represented at that hearing. In the absence of the claimant and her representative, the tribunal, however upheld the adjudication officer's decision. Thereafter the claimant sought a set aside of the tribunal's decision from another tribunal under Regulation 10 of the Adjudication Regulations 1995. A setting aside under those provisions was refused by the second tribunal. The claimant now appeals with leave of a Commissioner. Her appeal is partially supported by the adjudication officer now concerned.

3. The circumstances in which the claimant and her representative were absent from the hearing are not mentioned in the claimant's grounds of appeal although they were mentioned in the setting aside application referred to in paragraph 2 above. However in granting leave, the Commissioner raised this question. It is dealt with by the adjudication officer now concerned in his written submissions in a manner supportive of the claimant. The claimant's representative further comments on the issue, in turn supporting the comments of the adjudication officer now concerned, in the observations made by him on the submissions from the adjudication officer now concerned at page 82 of the bundle.

4. The situation in regard to the absence of the claimant and her representative from the hearing is as follows. On 9 December 1996 the claimant replied to a chairman's direction regarding the listing of her appeal as follows:

"I wish to attend my appeal hearing with my representative and I return form AT6. Please contact my representative before setting a date for the hearing".

On 23 January 1997 the claimant's representative sent a fax message to ITS, following upon the issue to the claimant and her representative of the details of the hearing which ITS had arranged. The fax included inter alia the following:

"She informed you that before setting a date, please get in touch with her representative. Due to other equally important commitment I cannot attend the hearing. [The claimant] is not willing to attend in my absence. In view of the above I respectfully request that you postpone the hearing."

There then appears on the file before me an unsigned postponement decision. Because the decision is unsigned, I cannot ascertain whether it was taken by a clerk or a tribunal chairman. Given however that the request at the top of the document is signed by a clerk, I probably can assume especially given the similarity of the handwriting involved that the decision was taken by a clerk also. In any event the decision runs as follows: "Not to be postponed. Reps have been informed that the ITS no longer pre-books cases in advance." When the hearing took place on 4 February 1997 the claimant was not present nor was she represented. The tribunal chairman has kept a commendably full record of proceedings which so far as relevant reads as follows:

"Client did not attend. Listed 2.00pm. Heard 2.15pm. Papers served on 14.1.97. PO confirmed address at ~~57/58/59/60/61/62/63/64/65/66/67/68/69/70/71/72/73/74/75/76/77/78/79/80/81/82/83/84/85/86/87/88/89/90/91/92/93/94/95/96/97/98/99/100~~ Due notice at above address. Proceed."

That note of the proceedings indicates, to the credit of the tribunal Chairman, that the tribunal had checked whether the papers had been properly served and also that the tribunal then made a conscious decision not to adjourn the case but rather to proceed in the light of the fact that they had been assured of proper service of the papers. Thus they complied with the requirements indicated in R(SB)19/83, paragraph 7. However that is not the end of the matter. I consider from the care with which the Chairman has completed the record of proceedings and also from the terms used by him therein that the documents referred to in this paragraph had not been drawn to the tribunal's attention. I take the view that if they had been they would have been referred to in the record of proceedings or at least their content would have been noted therein. I thus consider that although the tribunal made a conscious decision to proceed and not to adjourn the case, they did so in ignorance of the contents of the documents referred to in this paragraph. It seems clear that they were not drawn to the tribunal's attention, as they should have been, by the Clerk to the Tribunal.

5. In the circumstances described in paragraph 4 above the question therefore arises "Did the tribunal act properly in exercising their discretion to proceed granted by what is now Regulation 4(3) of the Adjudication Regulations 1995?" Putting the same question in different terms, "Did the tribunal deprive the claimant of her right to a fair hearing by deciding to proceed in her absence and the absence of her representative in the circumstances described above?" The tribunal proceeded in ignorance of factors highly material to the exercise of the discretion conferred by the said regulation. I accept that they cannot be blamed for that ignorance. However their decision to proceed, unaware of the contents of the documents described in paragraph 4 above cannot in my view stand and represents an error of law. The said Regulation 4(3) in terms states that the decision on whether or not to proceed shall be taken "having regard to all the circumstances". In this case the tribunal were not aware of all the relevant circumstances. In particular, they were not aware of the claimant's stated wish to attend the hearing and to do so accompanied by her representative. Further they were unaware that a specific request for postponement had been made and had been refused, apparently by a tribunal clerk. They were further unaware of the grounds for that refusal. All of these were highly material issues which clearly form part of "all the circumstances" of the case which the tribunal were bound to take into account. The reported case R(SB)23/83 was decided under a different statutory text. However the principles laid down there are still relevant. In paragraph 6 of that decision, Commissioner Goodman puts matters thus:

"As to the tribunal's decision to go ahead with the hearing I must assume, in the absence of any evidence to the contrary, that this was done consciously, ie that the chairman and members of the tribunal were aware that the claimant had said that he wished to be present. If there was any evidence that the tribunal was unaware of the claimant's desire to be present, then I might have had to set the tribunal's decision aside but there is no such evidence. Tribunals should of course always ascertain, in cases where the claimant does not appear and is not represented, whether the claimant has stated that he wishes to be present."

Applying these statements to this case, I consider that I must set aside the tribunal's decision. I have no way of knowing what decision the tribunal might have reached had they been aware of all the circumstances narrated in paragraph 4 above. It might well have been the case that with all the information before them they would still have chosen to proceed. I cannot however make that assumption. Alternatively, they might have chosen to adjourn the case had they been aware of all the facts. There is simply no way I can decide which option the tribunal would have exercised had they been properly appraised of all the relevant background. That renders it necessary for me to set aside their decision. For the avoidance of doubt, I must also state that the failure of the tribunal acting under Regulation 10 of the Adjudication Regulations 1995 to set aside the earlier tribunal's decision in no way binds me, albeit they were essentially concerned with much the same issue as I have dealt with in this paragraph. This is made clear in paragraphs 3 and 4 of R(SB)23/83. For the reasons given in detail in this paragraph therefore I hold that the tribunal's decision falls to be set aside in that they did not properly exercise the discretion conferred on them by the said Regulation 4(3) and in so doing they deprived the claimant of her right to a fair hearing of her appeal.

6. Given the view I have formed on the matters discussed in paragraphs 4 and 5 above, I do not consider it necessary or appropriate to express any view on the other issues canvassed by the claimant's representative and the adjudication officer now concerned in regard to the present appeal.

7. My directions to the new tribunal are as follows:

(a) Their task is to deal with matters in respect of the claimant's incapacity for work from 15 March 1996 until the date of the hearing before them unless the claimant has made a fresh claim of incapacity for work which has been adjudicated upon. In that event they should deal with matters only down to the day immediately before such adjudication took place.

(b) In the circumstances of this case they should recall that the legal onus of proof rests on the claimant.

(c) The tribunal should ascertain on the basis of all of the evidence before them, oral and written, medical or otherwise which activities and in turn which descriptors of the All Work Test apply to the claimant. They should then ascertain what the appropriate scoring for each relevant descriptor is and award that scoring to the claimant. They should then total the scorings for all descriptors which they consider are appropriate for the claimant's situation and on the basis of that total score assess whether or not she satisfies the said test and if so from which date. In reaching their determination as to the descriptors appropriate for the claimant, the tribunal should apply the test of reasonable regularity. They should ask

themselves whether the claimant can reasonably be expected to repeat any relevant function taking account of any pain or fatigue which she might suffer in doing so.

8. The claimant's appeal is successful. My decision is laid out in paragraph 1 above and my directions to the new tribunal are given in paragraph 7 above.

(signed)  
ALAN J GAMBLE  
Deputy Commissioner  
Date: 15 December 1998