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

1. Record of decision of Medical Appeal Tribunal—Regulation 12(1) of the National Insurance (Industrial Injuries) (Determination of Claims and Questions) (No. 2) Regulations 1967 (now Regulation 23(1) of the Social Security (Determination of Claims and Questions) Regulations 1975);

2. Assessment of Extent of Disablement under sections 5, 12 and 37 of and Schedule 4 to the National Insurance (Industrial Injuries) Act 1965 (now sections 50, 57 and 108 of and Schedule 8 to the Social Security Act 1975) and Regulation 2 of the National Insurance (Industrial Injuries) (Benefit) Regulations 1964 as amended (now Regulation 2 of the Social Security (Industrial Injuries) (Benefit) Regulations 1975 (hereinafter referred to as the Benefit Regulations)—provisions discussed in relation to hysteria, malingering and functional overlay.

The claimant, aged 34, injured his back in an industrial accident on 9 October 1969 and on 1 April 1970 underwent an urgent laminectomy. After intermediate proceedings, on 15 May 1972 a medical appeal tribunal gave a decision in which they made a final assessment of the claimant's disablement resulting from the relevant loss of faculty of 12 per cent for the period 9 April 1972 to 8 April 1974. The claimant's application for leave to appeal to a Commissioner from this decision was unsuccessful. On 6 November 1972 the claimant applied for a review of this decision on the ground of unforeseen aggravation and a medical board on 4 December 1972 decided that there had been unforescen aggravation and assessed the claimant's disablement at 40 per cent in a provisional assessment covering the inclusive period 6 August 1972 to 6 August 1974. The Secretary of State then directed a reference of this review decision to a medical appeal tribunal who decided on 11 March 1974 not to confirm the review decision of the medical board but assessed the claimant's disablement at 8 per cent for life from 6 August 1972.

Held, in allowing an appeal by the claimant to the Commissioner:—

i. that the medical appeal tribunal decision was not erroneous in point of law because it reduced a life assessment from 12 to 8 per cent but was crroneous in that they gave no reason for reducing the assessment. This omission constituted a failure, sufficient to amount to an error of law, to observe the requirements of regulation 12(1) of the National Insurance (Industrial Injuries) (Determination of Claims and Questions) (No. 2) Regulations 1967 (now regulation 23(1) of the Social Security (Determination of Claims and Questions) Regulations 1975) (paras 7 to 10);

ii. that the medical appeal tribunal should have explained why the functional overlay found was unconnected with the accident (para 16);

iii. functional overlay and hysteria are medically distinguishable but functional overlay, like hysteria is a "congenital defect" within the meaning of regulation 2(3) of the Benefit Regulations and the medical appeal tribunal should have considered whether it was a cause of disability constituting the "other effective cause" under regulation 2(2) thereof and thus to be taken into account in assessing the extent of disablement (paras 19 to 22);

iv. the question whether or not there are distinctions between functional overlay and hysteria which justify differences in the application of regulation 2(3) of the Benefit Regulations is a matter for a medical appeal tribunal to decide and explain (para 24); and

v. if a functional overlay is a spontaneous response not to the accident itself but to a stress situation developing subsequent to the accident, it may be necessary for a medical appeal tribunal to consider whether regulation 2(4) of the Benefit Regulations applies and if so, in what manner (para 23).

1. My decision is that the decision of the medical appeal tribunal dated 11th March 1974 is erroneous in point of law.

2. A medical appeal tribunal gave leave to the claimant to appeal to the Commissioner from the above-mentioned decision, and I directed an oral

hearing of the appeal and requested legal argument. The claimant and his wife attended the hearing and both addressed me. The Secretary of State was represented by Mr. Malik, a member of the solicitor's office of the Department of Health and Social Security, and in addition Dr. E. G. Wright, a principal medical officer of the Department, attended the hearing and gave evidence.

3. The relevant statutes in force at the time of the oral hearing of this appeal were repealed and replaced with effect from 6th April 1975 by the Social Security Act 1975 and the Social Security (Consequential Provisions) Act 1975. However, by virtue of section 2(2) of and Schedule 3 to the latter Act anything begun under the repealed statutes is to be continued under the corresponding provisions of the former Act. I shall refer in this decision to the provisions of the statutes and regulations obtaining before the coming into force of the 1975 legislation, inserting in brackets references to the corresponding provisions of the Social Security Act 1975 and the 1975 regulations.

4. The claimant, who is aged 34, injured his back in an industrial accident on 9th October 1969 and on 1st April 1970 underwent an urgent laminectomy. After intermediate proceedings, on 15th May 1972 a medical appeal tribunal gave a decision (referred to below as "the 1972 decision") in which they made a final assessment of the claimant's disablement resulting from the relevant loss of faculty of 12 per cent for the period 9th April 1972 to 8th April 1974. The claimant's application for leave to appeal to a Commissioner from the 1972 decision was unsuccessful.

5. On 6th November 1972 the claimant applied for a review of the 1972 decision on the ground of unforeseen aggravation, and this application was dealt with by a medical board on 4th December 1972. The board decided that there had been unforeseen aggravation and assessed the claimant's disablement at 40 per cent in a provisional assessment covering the inclusive period 6th August 1972 to 6th August 1974. No doubt the beginning date of that period was selected because it was the earliest date at which a revision made in a review decision given on the ground of unforeseen aggravation could begin to operate: see regulation 20 of the National Insurance (Industrial Injuries) (Determination of Claims and Questions) (No. 2) Regulations 1967 [S.I. 1967 No. 1571] (see now regulation 35 of S.I.1975 No. 558).

6. The Secretary of State then directed a reference of the review decision of 4th December 1972 to the medical appeal tribunal and, after two adjournments, the tribunal gave the decision dated 11th March 1974 now under appeal. In this decision, to which I will refer as "the 1974 decision", the tribunal did not confirm the review decision of the medical board but assessed the claimant's disablement at 8 per cent for life from 6th August 1972.

7. It is to be noted that the 1974 decision substituted an assessment of 8 per cent for one of 12 per cent, contained in the 1972 decision, in relation to the inclusive period 6th August 1972 to 8th April 1974. This reduction underlay the granting to the claimant of leave to make the present appeal, and also led the Secretary of State to submit to me that it is for my consideration whether an error of law was involved having regard to paragraphs 9 and 10 of the reported Commissioner's Decision R(I) 7/65.

8. The case dealt with in the Decision R(I) 7/65 was one in which there was a review on the ground of unforeseen aggravation of a decision awarding to the then claimant a disablement assessment of 5 per cent for life. Upon review, after provisional assessments for specified periods a medical board

assessed the disablement at 2 per cent for life, and a medical appeal tribunal confirmed that board's decision. The learned Commissioner who determined the appeal from the medical appeal tribunal's decision saw nothing erroneous in law if in the end there was a reduction of the life assessment awarded to the insured person concerned. In paragraph 10 of his decision, however, he commented: "The first assessment made on review—whether provisional or final—obviously cannot logically be at a lower figure than that of the 'reviewed' assessment, but it may be for a shorter period, because any provisional assessment is naturally for a shorter period than 'life'."

9. I respectfully agree with that decision and with the comment in the quoted passage. However, the powers conferred on a reviewing medical authority are so wide that it is difficult to affirm that a decision which is illogical is also necessarily illegal. The relevant law is to be found in section 40(5) of the National Insurance (Industrial Injuries) Act 1965 (1975; section 110(6)), which contains the following passage:—

> " Subject to the foregoing provisions of this section, a medical board may deal with a case on a review in any manner in which they could deal with it on an original reference to them, and in particular may make a provisional assessment notwithstanding that the assessment under review was final; . . ."

In my view, this quotation makes clear that a medical board giving a review decision have power to substitute for a final assessment for a limited period one for life, and to award the life assessment at whatever percentage they consider right. A medical appeal tribunal have, of course, the same powers. Accordingly, I do not consider that the observations in paragraphs 9 and 10 of the Decision R(I) 7/65 are authority for the proposition that the 1974 decision was erroneous in point of law.

10. On the other hand I would expect that, notwithstanding their extensive legal powers, a reviewing medical authority would not in their first decision without cogent reason reduce the assessment of an earlier medical authority covering a limited period. In the present case the medical appeal tribunal of 1974 gave no reason for reducing from 12 per cent to 8 per cent the assessment contained in the 1972 decision in relation to the inclusive period 6th August 1972 to 8th April 1974. The claimant is entitled to know what were their reasons and, in my view, their omission to explain them constitutes a failure, sufficient to amount to an error of law, to observe the requirement of regulation 12(1) of the above-mentioned Regulations S.I. 1967 No. 1571 (1975: Regulation 23(1) of S.I. 1975 No. 558). Consequently on this ground I find that the decision under appeal was erroneous in point of law.

11. Unfortunately, I cannot conclude this decision without more, because important points have been raised on the claimant's behalf, which I have to discuss. They emerge from the following passage included in the reasons of the 1974 decision:—

> " . . . At the conclusion of their examination the medical members were satisfied that a gross functional overlay, unconnected with the relevant accident, was present and this was also the opinion of two Orthopaedic Consultants recorded in their reports of 27 June 1973 and 4 January 1974. It appears from the report dated 4 January 1974 that a Neuro Consultant who saw the claimant at Southampton was of the same opinion. The mild depression which appears to be present is, in the opinion of the medical members, of constitutional origin. . . ."

12. Amongst the grounds for seeking leave to appeal submitted by the claimant's solicitors was a contention that the tribunal had failed to give their reasons for stating that the functional overlay was unconnected with the relevant accident. This contention seemed to me to disclose an arguable point, and also I was myself in doubt in what sense the tribunal used the expression "functional overlay". Accordingly, I requested a technical explanation by one of the Department's medical officers of the meaning of the phrase. Dr. Wright wrote a report in response to this request, and also gave evidence at the oral hearing supplementing his report. After the oral hearing I gave permission to the claimant's solicitors to submit a statement dealing with Dr. Wright's report which they had received only a day or two before the date fixed for the hearing. They submitted a statement in which, after referring to regulation 2(3) of the National Insurance (Industrial Injuries) (Benefit) Regulations 1964 [S.I. 1964 No. 504] (1975: regulation 2(3) of S.I. 1975 No. 559) and the reported Commissioner's Decision R(I) 8/74, they contended that "the medical appeal tribunal should have been satisfied, and have so stated, that even if [the claimant] had not suffered the back injury on the 9th October 1969 he would, nevertheless, now be affected by his present disabilities"; that the tribunal did not so state, and accordingly that their decision was erroneous in law.

13. I must, therefore, deal with the two contentions (a) that the medical appeal tribunal gave no reasons for asserting that the functional overlay was unconnected with the accident, and (b) that they had failed to observe the provisions of the above-mentioned regulation 2(3). Other grounds of appeal were relied on by the claimant, but I do not consider that there is substance in any of them and will therefore refrain from discussing them. Before dealing with the two contentions in issue, I will first discuss the meaning of "functional overlay".

14. In his written statement, Dr. Wright distinguished between the three states of mind (a) hysteria, (b) malingering and (c) "functional, nervous or psychiatric overlay".

(a) He described hysteria as a well recognised mental state in which symptoms of disability are represented by an individual for the sake of some advantage without him being conscious of the motive, and stated that a mental abnormality is present before the injury and would be assessable as disabling if it could be recognised.

(b) Malingering Dr. Wright described as a deliberate and conscious simulation of illness or disability for the sake of advantage, but stated that true malingering is very rare especially in the field of industrial accidents.

(c) On the other hand he stated that some degree of exaggeration of existing symptoms is extremely common and although it may be difficult to determine how much of the exaggeration is conscious it may be clear that there is no definable mental condition present which gives rise to it. "This inexact state of affairs", he wrote, "is usually described as a functional overlay or, less commonly, a psychiatric or nervous overlay and these terms are generally understood in the medical profession to mean an exaggeration of symptoms over and above the level which seems to be reasonable after careful study of the clinical picture and the results of radiological and other appropriate investigations . . . The condition described is entirely subjective and is a manifestation of constitutional mental make-up not related to any injury industrial or otherwise." Finally, he

suggested that in this case perhaps the medical appeal tribunal might more accurately have expressed their meaning if, instead of stating that the claimant's functional overlay was unconnected with the accident, they had stated that the functional overlay "was not caused by the accident".

15. In his oral statement at the hearing of this appeal, Dr. Wright said that "functional overlay" is an inexact term (he called it "pseudo-scientific"), that the term is used in a very indefinite area of medicine in which one doctor may disagree with another, and that there is no general consensus amongst psychiatrists about the phenomena intended to be described by it. He distinguished hysteria from functional overlay on the grounds that hysteria does not, whereas functional overlay does, involve the exaggeration of symptoms; and that hysteria is, whereas functional overlay is not, a proper psychiatric condition.

16. I need hardly say that I accept Dr. Wright's analysis of the meaning attached to the term "functional overlay" by members of the medical profession; although I venture to suggest that on occasions some of them use it in other senses. With that analysis in mind I have to consider whether the medical appeal tribunal should have explained their statement that the functional overlay was unconnected with the accident. I consider that they should have done so. It has to be remembered that the decision is directed at laymen and these, particularly the claimant, should be enabled to understand the sequence of ideas. Now that I have heard Dr. Wright's explanation of the use by medical men of "functional overlay", I am able to understand better what the tribunal meant, but without that explanation I should have wondered how it could happen that the functional overlay was unconnected with the accident. To laymen, it seems inevitable that there is a connection between the two.

17. There remains the question whether the decision under appeal offended against the provisions of the above-mentioned regulation 2(3). This is a more complex question than the first and requires that I refer to the relevant statutory provisions and case law. The statutory provisions consist of sections 5, 12 and 37 of and Schedule 4 to the National Insurance (Industrial Injuries) Act 1965 (1975: sections 50, 57 and 108 and Schedule 8), and the above-mentioned regulations [S.I. 1964 No. 504] (referred to below as "the Benefit Regulations"). The three sections of the Act establish the statutory chain of causation leading to a successful claim for disablement benefit. The chain consists of four links, that is to say *accident—injury—loss of faculty—disablement.* The medical authorities alone may determine whether or not there is a loss of faculty in any given case, and if so in what it consists. And for an explanation of the phrase "loss of faculty" I refer to the speech of Lord Diplock in *Jones v. Secretary of State for Social Services, Hudson v. Same* [1972] A.C. 944 (See also the supplement to Decision R(I) 3/69). He said (at p. 1010C) (supplement to Decision R(I) 3/69 at p. 200E):—

> " 'Loss of faculty' is used in the statute to describe a cause of disabilities to do things which in sum constitute the disablement. It is used in the medical sense of loss of power or function of an organ of the body."

After the loss of faculty has been determined an assessment of the resulting disablement must be made, again by the medical authorities and the principles whereby the assessment is to be made are laid down in Schedule 4 to the 1965 Act and in the Benefit Regulations.

18. So far as material, Schedule 4, as amended with effect from 28th October 1970, reads as follows:—

"1. For the purposes of section 12 of this Act, the extent of disablement shall be assessed, by reference to the disabilities incurred by the claimant as a result of the relevant loss of faculty, in accordance with the following general principles:—

(a) save as hereafter provided in this paragraph, the disabilities to be taken into account shall be all disabilities so incurred (whether or not involving loss of earning power or additional expense) to which the claimant may be expected, having regard to his physical and mental condition at the date of the assessment, to be subject during the period taken into account by the assessment as compared with a person of the same age and sex whose physical and mental condition is normal;

(aa) regulations may make provision as to the extent (if any) to which any disabilities are to be taken into account where they are disabilities which, though resulting from the relevant loss of faculty, also result, or without the relevant accident might have been expected to result, from a cause other than the relevant accident."

So far as material Regulation 2 of the Benefit Regulations, as amended in 1970, reads as follows:—

"2. (1) Schedule 4 (general principles relating to the assessment of the extent of disablement) to the National Insurance (Industrial Injuries) Act 1965 (hereafter in this regulation referred to as the 'Act of 1965') shall have effect subject to the provisions of this regulation.

(2) In assessing the extent of disablement for the purposes of section 12 of the Act of 1965, any disabilities which, though resulting from the relevant loss of faculty, also result, or without the relevant accident might have been expected to result, from a cause other than the relevant accident (hereafter in this regulation referred to as 'the other effective cause') shall only be taken into account subject to and in accordance with the following provisions of this regulation.

(3) Any assessment of the extent of disablement made by reference to any disability to which paragraph (2) of this regulation applies, in a case where the other effective cause is a congenital defect or is an injury or disease received or contracted before the relevant accident, shall take account of all such disablement except to the extent to which the claimant would have been subject thereto during the period taken into account by the assessment if the relevant accident had not occurred."

19. Schedule 4 and regulation 2 have been carefully framed so as to ensure that generally a disability which has a dual causation, that is to say the relevant loss of faculty and another cause, shall be taken into account in assessing the extent of a disablement. Such a disability is only to be excluded from the assessment if and to the extent to which the claimant concerned would have been subject to it if he had not sustained the relevant accident. It must follow that the words "so incurred" in paragraph 1(a) of Schedule 4 should be interpreted to include a disability with such a dual causation: see paragraph 20 of the Commissioner's Decision R(I) 2/74. It is also noteworthy that regulation 2(3) deals in disabilities, and only authorises an offset if a

disability, not some underlying condition, would have been present supposing that the claimant concerned had not undergone the accident.

20. The points mentioned in the foregoing paragraphs are dealt with in the four Commissioner's Decisions C.I. 37/67 and C.I. 10/72 (both unreported), and R(I) 2/74 and R(I) 8/74. All of these save R(I) 2/74 dealt with hysteria cases, and I will take the latest, R(I) 8/74, as the exemplar. In the case dealt with in that decision, a medical appeal tribunal had made a large offset on the ground that the then claimant's disability was not a direct result of the injury which she had sustained in her industrial accident, but was due to a hysterical trait in her personality which the tribunal characterised as a "pre-existing constitutional personality defect". The offset was held to be wrong because regulation 2(3) does not authorize an offset in respect of a pre-existing personality defect; it only authorizes an offset for a disability.

21. In the unreported Decision C.I. 10/72 (paragraph 13) I expressed the view that a predisposition to hysteria was a "congenital defect" within the meaning of regulation 2(3), and in the reported Decision R(I) 2/74 (paragraph 21) the then Chief Commissioner agreed. In the light of Dr. Wright's statements of which I have given an account in paragraphs 14 and 15 above, I am confirmed in this view. Thus, an offset in respect of a hysterical disposition is not authorized. The present claimant's contention is, in effect, that the same holds good for a functional overlay, and I have found this contention a difficult one to judge.

22. Mr. Malik submitted to me that a functional overlay does not bring regulation 2(3) into play at all. He argued that it is not a congenital defect or an injury or disease within the meaning of the regulation, and accordingly cannot constitute another "effective cause" of the kind contemplated by it. Clearly a functional overlay is not an injury or disease; the question is whether it is a "congenital defect". In the context of regulation 2(3) I do not think that "congenital" should receive its primary meaning, which is "begotten" or "born with"; see the Shorter Oxford English Dictionary. In my view, the word is used in this regulation in a rather wider sense. I think that it must be taken to mean "inherent" or "constitutional", that is to say that it refers to a defect which is a natural constituent of the person's make-up whether physical or mental. Since Dr. Wright stated that a functional overlay is "a manifestation of constitutional mental make-up", I cannot hold that it is not covered by the phrase "congenital defect" in regulation 2(3).

23. On the other hand, I am not convinced that for the purposes of applying regulation 2(3) there is no distinction to be made on medical grounds between the manifestations of a functional overlay and those of hysteria. Dr. Wright drew attention to two points of distinction, and I think that there may be another which, if not generally applicable, applies to this case. The two consultants' reports referred to by the medical appeal tribunal in their reasons (see paragraph 11 above) indicate to my mind that a tenable view of the claimant's functional overlay is that it is a response, not to the accident, but to a stress situation which has arisen since the accident; whereas I apprehend that a hysterical manifestation is a spontaneous response to the accident itself. If this is so, then it may be necessary for the medical appeal tribunal to consider whether regulation 2(4) (which I have not quoted) applies and if so in what manner.

24. Whether or not there are distinctions between functional overlay and hysteria which justify differences in the application of regulation 2(3) is for

the medical appeal tribunal to say. But, as I have already stated, in my view explanation of their views on this difficult topic is required. I must add that in the 1974 decision it is not clear whether the medical appeal tribunal used the term "functional overlay" to describe symptoms of the claimant or his state of mind. This is an important consideration because, as already mentioned, regulation 2(3) only authorizes an offset for a disability; no offset is authorized for a state of mind as such.

25. In the result, therefore, I allow this appeal for the reasons stated in paragraphs 10 and 16 above. In accordance with the usual practice, the claimant's appeal from the review decision of the medical board dated 4th December 1972 should now be re-determined by a medical appeal tribunal entirely differently constituted from the tribunal of 11th March 1974.

(Signed) R. S. Lazarus,
Commissioner.