

## R(IB) 2/07

**Mr M Rowland, Commissioner**

**CSIB/803/2005**

**Mrs L T Parker, Commissioner**

**CSIB/818/2005**

**Sir Crispin Agnew of Lochnaw Bt QC, Deputy Commissioner**

**30 October 2006**

### **Personal capability assessment - activity 14: “remaining conscious” - whether amendment to definition of activity validly made**

The claimants had their awards superseded after scoring insufficient points to satisfy the personal capability assessment. The claimant in CSIB/803/2005 appealed to a tribunal, contending that she was entitled to 15 points under descriptor 14(b) because she had “an involuntary episode of lost or altered consciousness at least once a week” due to severe headaches. She relied on R(IB) 3/04, submitting that the amendment made in 1996 to paragraph 14 of the Schedule to the Social Security (Incapacity for Work) (General) Regulations 1995, whereby the terms of Activity 14 (“[r]emaining conscious”) had been qualified by the phrase “without having epileptic or similar seizures during waking moments”, had been invalid. The claimant in CSIB/818/2005 submitted to the tribunal that he suffered from serious headaches, loss of concentration and mild dizziness. According to his medical report, his prescribed medication tended to make him sleepy, particularly in the mornings. His representative placed some reliance on Activity 14 although it was not at the forefront of his case and was not mentioned in the tribunal’s statement of reasons. Both appeals were dismissed. On the claimants’ further appeals, a Tribunal of Commissioners was appointed to consider whether R(IB) 3/04 had correctly decided that, in the light of *Howker v Secretary of State for Work and Pensions* [2002] EWCA Civ 1632 (reported as R(IB) 3/03), the amendment to Activity 14 was invalid because, in a memorandum placed before the Social Security Advisory Committee by the Secretary of State its effect had been described as “neutral” when it was adverse to claimants.

*Held*, dismissing both appeals, that:

1. applying *Howker*, the relevant test of invalidity was not merely whether the label “neutral” was accurate but was whether the overall effect of all the material placed before the Committee was misleading and whether there was a real possibility that a different result would have happened had that irregularity not occurred (paragraphs 35 and 36);
2. the validity of the amendment could not be determined without consideration of its meaning and effect because a provision should, if possible, be construed so that it is valid and the material placed before the Committee was a legitimate aid to the construction of the amendment (paragraphs 38 and 39);
3. a person had an “episode of ... altered consciousness” when he or she was no longer properly aware of his surroundings or his condition, so as to be incapable of any deliberate act (paragraphs 11 and 47);
4. “seizures” were involuntary, overwhelming and sudden and the phrase “similar seizures” was to be construed by reference to the similarity of the effects of the seizures to the effects of epileptic seizures, including the degree of suddenness of the loss or alteration of consciousness, but without consideration of whether the seizures were characterised by the discharge of cerebral neurones (paragraphs 11, 41, 42 and 56);
5. the legislation being construed in that way, the material placed before the Committee was not misleading and the amendment was valid (R(IB) 3/04 disapproved) (paragraphs 10, 52 and 58);
6. a Commissioner who has held a tribunal to have erred in law need refer the case to another tribunal only if he or she is not able properly to deal with any outstanding factual issues and, had the amendment been found to be invalid, the remaining issue in CSIB/818/2005 would have been largely a question of law which the Commissioners would have resolved themselves (paragraphs 66 to 69).

## DECISION OF A TRIBUNAL OF SOCIAL SECURITY COMMISSIONERS

### Decisions

#### CSIB/803/2005

1. We dismiss the claimant's appeal against the decision of the Greenock appeal tribunal dated 25 August 2005.

#### CSIB/818/2005

2. We dismiss the claimant's appeal against the decision of the Glasgow appeal tribunal dated 3 October 2005.

### Introduction

3. The Chief Social Security Commissioner appointed a Tribunal of Commissioners to hear these appeals because they raise a point of special difficulty as to the validity of the amendment to paragraph 14 of the Schedule to the Social Security (Incapacity for Work) (General) Regulations 1995 (SI 1995/311) made by regulation 2(11)(a)(iii) of the Social Security (Incapacity for Work and Miscellaneous Amendments) Regulations 1996 (SI 1996/3207).

4. Section 171C(1) and (2) of the Social Security Contributions and Benefits Act 1992 provides:

“(1) Where the own occupation test is not applicable, or has ceased to apply, in the case of a person, the question whether the person is capable or incapable of work shall be determined in accordance with a personal capability assessment.

(2) Provision shall be made by regulations –

- (a) defining a personal capability assessment by reference to the extent to which a person who has some specific disease or bodily or mental disablement is capable or incapable of performing such activities as may be prescribed;
- (b) as to the manner of assessing whether a person is, in accordance with a personal capability assessment, incapable of work.”

5. Part III of the 1995 Regulations makes provision for the personal capability assessment and the Schedule sets out in column (1) a number of activities in respect of each of which there are listed in column (2) a number of descriptors. Column (3) then lists a number of points against each descriptor. By regulations 25(1) and 26(3), a person is to be treated as incapable of work if he obtains a total score of at least 15 points in respect of descriptors specified in Part I of the Schedule, or at least 10 points in respect of descriptors specified in Part II or at least 15 points in respect of descriptors specified in both Parts, counting the score from only one descriptor in respect of each activity in Part I. When first enacted, paragraph 14 of the Schedule, which falls within Part I, provided:

(1) <i>Activity</i>	(2) <i>Descriptor</i>	(3) <i>Points</i>
14. Remaining conscious other than for normal periods of sleep	(a) Has an involuntary episode of lost or altered consciousness at least once a day.	15
	(b) Has an involuntary episode of lost or altered consciousness at least once a week.	15
	(c) Has an involuntary episode of lost or altered consciousness at least once a month.	15
	(d) Has had an involuntary episode of lost or altered consciousness at least twice in the 6 months before the day in respect to which it falls to be determined whether he is incapable of work for the purposes of entitlement to any benefit, allowance or advantage.	12
	(e) Has had an involuntary episode of lost or altered consciousness once in the 6 months before the day in respect to which it falls to be determined whether he is incapable of work for the purposes of entitlement to any benefit, allowance or advantage.	8
	(f) Has had an involuntary episode of lost or altered consciousness once in the 3 years before the day in respect to which it falls to be determined whether he is incapable of work for the purposes of entitlement to any benefit, allowance or advantage.	0
	(g) Has no problems with consciousness.	0

6. The amendment made by regulation 2(11)(a)(iii) of the 1996 Regulations was to the entry in column (1). The words “other than for normal periods of sleep” were replaced by the words “without having epileptic or similar seizures during waking moments” so that the entry now reads:

“Remaining conscious without having epileptic or similar seizures during waking moments”.

7. In R(IB) 3/04, Mr Commissioner Jacobs held the amendment to be invalid in the light of the decision of the Court of Appeal in *Howker v Secretary of State for Work and Pensions* [2002] EWCA Civ 1632; [2003] ICR 405 (also reported as R(IB) 3/03) in which the Court had held an amendment to regulation 27 of the 1995 Regulations made by the 1996 Regulations to have been invalid. However, in CSIB/148/2005, which concerned yet another amendment made to the 1995 Regulations by the 1996 Regulations, Mr Commissioner May QC disagreed with the approach taken in R(IB) 3/04. It was in the light of that expression of disagreement that Mr Chris Orr, a welfare rights officer of Glasgow City Council who was then

representing the claimant in CSIB/818/2005, suggested that a Tribunal of Commissioners be appointed to consider whether R(IB) 3/04 had been correctly decided.

### **The main issues**

8. The principal issue in these appeals, therefore, is whether, in light of the Court of Appeal decision in *Howker*, the amendment to the description of Activity 14 (“[r]emaining conscious”) in the Schedule to the 1995 Regulations, whereby the words “without having epileptic or similar seizures during waking moments” were substituted for “other than for normal periods of sleep”, was valid, or was invalid because of procedural impropriety similar to that found to have applied in *Howker*.

9. Related issues arise as to the meaning of “altered consciousness” and “similar seizures”.

### **Determination of issues**

10. We hold that the amendment to Activity 14 was valid.

11. We hold that a person has an episode of “altered consciousness” when he or she is no longer properly aware of his surroundings or his condition, so as to be incapable of any deliberate act. We also hold that “seizures” are involuntary, overwhelming and sudden and that the phrase “similar seizures” is to be construed by reference to the similarity of the **effects** of the seizures to epileptic seizures, including the degree of suddenness of the loss or alteration of consciousness but without consideration of whether the seizures are characterised by the discharge of cerebral neurones.

### **The proceedings**

#### **CSIB/803/2005**

12. In CSIB/803/2005, the claimant suffers from depression and also from headaches. She claimed, and was awarded, incapacity benefit from 16 August 2003. A decision of the Secretary of State superseding the award with effect from 13 January 2004 was overturned on appeal by a tribunal who found that the claimant scored a sufficient number of points under Part II of the Schedule to the 1995 Regulations (which is concerned with mental disablement) to satisfy the personal capability assessment so that she remained entitled to benefit. However, on 25 April 2005, the Secretary of State superseded the tribunal’s decision on the ground that the claimant had scored only 6 points under Part II of the Schedule. With the assistance of Mr Pat Clark, a welfare rights officer of Inverclyde Council who has represented her throughout, she appealed, contending that she was entitled to 15 points under descriptor 14(b) because she had an involuntary episode of lost or altered consciousness at least once a week due to severe headaches. Mr Clark conceded that the claimant had not suffered epileptic or similar seizures but relied upon R(IB) 3/04 and submitted that the amendment to paragraph 14 of the Schedule to the 1995 Regulations had been invalid.

13. The Greenock appeal tribunal accepted that the amendment had been invalid but it nonetheless dismissed the claimant’s appeal. Its findings of fact include:

“10. The Appellant suffers from headaches once or twice a week. These headaches are not accompanied by vomiting or other symptoms normally associated with severe migraine.

11. The duration of the headaches are [sic] usually between 2-2½ hours.”

14. The material part of the tribunal’s reasoning, which refers to other findings the tribunal made, is as follows:

“Mr Clark referred the Tribunal to the comments of Commissioner Walker in Commissioner’s Decision CSIB/14/96 and submitted that in the circumstances before the Tribunal, the Appellant’s headaches constituted a loss of consciousness, which would satisfy descriptor 14(b) in its original form.

The Tribunal adopted the tests as suggested by the Commissioner and, on the findings of fact, concluded that in the circumstances of this particular case, the degree of awareness of the Appellant did not become so distorted or restricted by a degree of pain sufficient to that end, when for the duration of that distorted or restricted awareness of perception, the Appellant’s consciousness could properly be said to have become altered.

From all of the evidence, and in particular from that of the Appellant herself, the only physical limitations, which the headaches placed on her, were that she took paracetamol and lay in a darkened room for the 1-1½ hours of the headache. During this period, she was able to take her own medication, draw the curtains, tune her radio and adjust it to a level which she considered reasonable.

The Tribunal accepted the evidence of the Appellant that she would not, during the course of her headaches, answer the doorbell or the telephone. The Tribunal was unanimously of the view that this was simply a matter of choice on her part, and that her headaches did not preclude her from doing so.

On the one occasion when the headache was experienced out of doors, the Appellant was able to travel by bus to her home before requiring to lie down.

Having considered all of the evidence before it, the Tribunal were unanimously of the opinion that the Appellant was not so distracted by pain that she required to lie down and otherwise retire from what she was doing. It follows accordingly, that the Tribunal did not conclude that her consciousness had been altered by the pain and that she was incapable of doing anything effective other than coping with it.”

The claimant now appeals against the Greenock appeal tribunal’s decision with the leave of a tribunal chairman.

#### **CSIB/818/2005**

15. In CSIB/818/2005, the claimant was treated as having claimed “credits” on the ground of his incapacity for work and such “credits” were awarded from 22 April 2004. However, the Secretary of State superseded that award from 6 April 2005 on the ground that the claimant had scored no points on a personal capability assessment. With Mr Orr’s assistance, the claimant appealed. There was evidence to the effect that the claimant had suffered a head injury when assaulted and, as a result, suffered from, among other things, serious headaches, loss of concentration and memory, double vision and mild dizziness. In a medical report obtained for the hearing before the tribunal and dated 27 September 2005, it was said:

“... he has constant pain in his left temple and above his left ear. This pain is of variable intensity – varying from a dull ache to a severe pain that can incapacitate him (he has to lie down, feels dizzy and is unable to eat) for anything from 4 to 48 hours. Episodes of this severity occur about twice a month and occur without warning. His prescribed medication ... tends to make him sleepy – particularly in the mornings.”

16. Activity 14 was not in the forefront of the claimant’s case before the Glasgow appeal tribunal but it is plain from the record of proceedings that Mr Orr did place some reliance on it. He conceded that, if the amendment made by the 1996 Regulations was valid, Activity 14 had no application to the claimant’s case but it appears that he contended that it was invalid in the light of *Howker* and that, if so, the claimant fell within the scope of Activity 14, not because of the headaches but because the claimant’s medication caused him to fall asleep. The claimant’s appeal was dismissed. The tribunal chairman made no mention of Activity 14 in her statement of reasons for the tribunal’s decision, save insofar as she recorded that the tribunal had accepted the opinion of the examining medical practitioner. The claimant now appeals against the Glasgow appeal tribunal’s decision with the leave of Mrs Commissioner Parker.

### **Oral Hearing**

17. An oral hearing was held before us in Edinburgh. The claimant in CSIB/803/2005 was again represented by Mr Pat Clark. The claimant in CSIB/818/2005 was represented by Mr Simon Collins, Advocate, instructed by Ms Lesley-Ann Mulholland, Solicitor, Quinn Martin & Langan, Glasgow. Mr Chris Orr was also in attendance at the hearing. The Secretary of State was represented by Mr Jonathan Brodie, Advocate, instructed by Mr Colin Brown, Solicitor to the Advocate General for Scotland.

### **Background**

#### **The Social Security Advisory Committee**

18. Sections 170 to 174 of the Social Security Administration Act 1992 make provision for the Social Security Advisory Committee to give advice and assistance to the Secretary of State in connection with the discharge of his functions, including the functions of making regulations, and section 172(1) provides that, save in certain circumstances, the Secretary of State should refer proposals to make regulations to the Committee. By virtue of section 173(1)(b), one of the excepted circumstances is where the Committee has agreed that the proposals should not be referred. Section 170(4) requires the Secretary of State to furnish the Committee with such information as it may reasonably require for the proper discharge of its functions.

19. The process was explained by Peter Gibson LJ at [13] in *Howker* and that explanation was accepted as accurate at the hearing before us.

“[13] The procedure adopted by the Committee and the Department is that the Department refers proposed amendments to regulations to the Committee on an informal basis so that the Committee has the opportunity to decide whether it wishes the proposed amendments to be referred formally to it under section 172 or whether it agrees under section 173 that they should not be referred. The practice of the Department, when presenting packages of regulations to the Committee, is to describe each item proposed and, at the

Committee's request, to add an indicator to show whether the item is technical, neutral, adverse or beneficial. Of those indicators, 'neutral' means:

'The amendment has an effect in changing the wording but only to clarify its meaning to what it was always believed to have meant. This may arise because lawyers have realised it could mean something different. However, no one will lose or gain, the amendment simply secures what has always been the interpretation of the present wording.'

In contrast 'adverse' means:

'This is used when existing claimants will lose money in future. It may only involve a few people and the loss may be of money they clearly should not have had – but there is a loss.'

20. The proposals for the 1996 Regulations were considered by the Committee at a meeting on 6 November 1996, attended by officials from the Department. The Committee agreed that all the proposals save one should not be referred to it. The Secretary of State did not proceed with the one that the Committee had said should be referred.

### **Howker**

21. In relation to the proposed amendment to regulation 27 of the 1995 Regulations, which was in issue in *Howker*, the Commissioner (whose decision is on file CIB/4563/1998) found that the Committee members were materially misled by what they were told by the Departmental officials in a letter and a commentary explaining the proposed amendment, which was labelled as "neutral". The Commissioner also inferred from the evidence that the Committee would have required the proposal to be referred to it had it not been misled. In those circumstances, Peter Gibson LJ said:

"[35] ... In my judgment it is clear that notwithstanding the fact that the Committee's role was, as its name implies, advisory, it was intended by the statutory scheme that the Committee's advice on the proposed regulations would be received by the Secretary of State and laid before Parliament unless the Committee agreed to no reference to it. This is emphasised by the mandatory requirement in section 172(1) that the Secretary of State 'shall' refer the proposals to the Committee and by the requirement, even in a case of urgency when the Secretary of State is empowered to dispense with a reference, to refer the regulations so made to the Committee as soon as practicable after they are made, and the obligation on the Secretary of State to explain to Parliament, if he proposes not to give effect to the Committee's recommendations, his reasons why not. Plainly in the absence of the Committee's agreement Parliament was intended to have the benefit of the Committee's advice so as to be able to assess the new regulations.

[36] In that context the agreement of the Committee not to have a reference to it of proposed regulations assumes importance. Further, Parliament plainly intended that the agreement of the Committee should be an informed agreement, and the obligation under section 170(4) on the Secretary of State to provide such information as the Committee reasonably requires is equally plainly relevant, provided that the Committee has so required. In my judgment in the agreed practice to which I have referred in paragraph 13

above the Committee can be taken to have made a requirement for the purposes of section 170(4). As the Commissioner said in paragraph 15 of his decision of the officials of the Department providing information and assistance in relation to the detail and intended effect of a proposal:

‘The Committee's assumption that it can rely on these officials to provide full, balanced and objective information without relevant points being withheld or obscured is in my judgment an entirely proper one, wholly consistent with the intention of section 170(4). The Committee members should be able to rely implicitly and without question on the completeness of what they are told [by] those whose duty it is to assist them. It is quite inconsistent with the scheme of Part XIII of the Act for it to be thought otherwise.’

[37] Where, as in the present case, the Secretary of State through his officials has misled the Committee by information which is obviously incorrect if comparison is made between the old regulation 27 and the new regulation 27, and thereby procured the Committee's agreement to no reference, and where, as the Commissioner has found, the provision of the correct information would have led to a reference (or the withdrawal of the new regulation 27), and the Secretary of State proceeds to make the new regulation 27, it is manifest, to my mind, that the procedure intended by Parliament for the making of regulations has not been observed. That is so whether or not the officials acted innocently. There is nothing in the statutory provisions to suggest that Parliament would have intended so defective a procedure adopted by the Secretary of State, when matters were entirely under his control, to result in a valid regulation.”

Accordingly, he held the relevant amendment to regulation 27 of the 1995 Regulations to be invalid and Mance and Hale LJJ agreed.

#### **The Committee's consideration of the amendment to Activity 14**

22. The documents considered in *Howker* also dealt with the proposed amendment to Activity 14. The Committee had before it a letter from Mr M J Axton, a senior civil servant, with which were enclosed the draft regulations and a commentary on them. In his letter, Mr Axton began:

“The Secretary of State for Social Security proposes to introduce a package of amending regulations affecting the assessment of benefits for people who are incapable of work.

The package introduces the first changes to the legislation since the introduction of Incapacity Benefit in April 1995, and inevitably includes a number of minor tidying-up measures, including clarification of areas in which ambiguities have led to inconsistent application of the provisions. These include minor changes to the wording of some of the all work test descriptors.”

The “all work test” was what is now called a “personal capability assessment”.

23. The proposed amendment to Activity 14 was listed in the commentary as “Proposal 20” and the following explanation was given:

“Activity 14 – remaining conscious other than for normal periods of sleep [neutral amendment]”

This activity is intended to assess the ability of a person to continue working, or to work safely, where they have a form of loss of consciousness. The intention was that descriptors within this activity may apply to people who suffered fits, similar to epileptic episodes. The current wording has led to some confusion for those applying the test, as to whether spells of dizziness or vertigo should be awarded a descriptor. We propose an amendment to the wording of this activity. By specifying the type of fit that is applicable, the amendment will make it clear that momentary disturbances of consciousness (such as spells of dizziness, vertigo and giddiness) should not count.”

24. The minutes of the Committee’s meeting, which was attended by a large number of civil servants including a Dr Sawney, include the following two paragraphs:

“3.4 Members queried whether the Department’s description of some of the amendments as neutral in effect was correct. The Secretary reminded the Committee that this categorisation had been agreed as applying where the proposed amendment confirmed current practice and was intended to prevent any other interpretation being placed on the regulation.

...

3.6 The chairman noted that the proposed new definition of the ‘consciousness’ activity did not appear to cover dizziness or vertigo, although a person who suffered from such disabilities could find it difficult to work. Dr Sawney said that the intention had been to ensure that the consciousness category covered the more extreme cases, such as epileptic or similar seizures. Other problems, such as dizzy spells, were functionally covered in the AWT. If a person was incapacitated, for example, by dizziness, to the point where they were unable to walk, climb stairs etc. this would be reflected in their scores for those particular activities. Similar arrangements applied to other common conditions which were not separately categorised, such as shortness of breath.”

**R(IB) 3/04**

25. In R(IB) 3/04, the Secretary of State correctly conceded before Mr Commissioner Jacobs that the approach taken in Howker could be applied to amendments other than that to regulation 27 but he appears to have submitted that the question the Commissioner had to decide was simply whether the label of “neutral” given to the amendment to Activity 14 was accurate. He appears not to have conceded that that label was inaccurate but also appears not to have put up much resistance to the suggestion that it might have been. In any event, Mr Commissioner Jacobs found that the label was inaccurate and, on that ground alone, found the amendment to be invalid.

26. The Secretary of State appears to have been content with that decision until, in CSIB/148/2005, Mr Commissioner May QC held Mr Commissioner Jacobs’ approach to have been wrong. There was neither an appeal against Mr Commissioner Jacobs’ decision nor a proposal for a new amendment and, as Mr Clark pointed out to us, the forms claimants must fill in appear to have been amended to reflect the Commissioner’s decision.

### Submissions for the claimants

27. Mr Collins addressed us first, amplifying his written submissions. He implicitly accepted Mr Commissioner May QC's criticisms of R(IB) 3/04 and that it followed that the question that should have been considered was whether the overall effect of all the material before the Committee, of which the label of "neutral" was just one part, was misleading. He argued that the approach by Peter Gibson LJ in *Howker* at [37] was not a prescriptive test, but was an example of how the Court approached the question of the procedural validity of a statutory instrument: the test was whether or not there has been a sufficiently material irregularity in the statutory procedure. This was a matter of assessment for the Commissioners. It was important to note that the validity of a mandatory consultation procedure was not dependent on establishing that "but for" the failures to properly consult (including the failures of the consulting party to provide the consultee with full and accurate information) the ultimate outcome of the process would have been different. The question should rather be whether the proper inference to draw from the facts was that there was a real possibility that a different result – in this case, a formal referral of the amendment – would have happened had the irregularity not occurred. If there was, then the irregularity could not be said to be immaterial. In relation to the amendment to Activity 14, he submitted that the information before the Committee was misleading because it had incorrectly been represented that no-one would be worse off as a result of the amendment and that it was relevant that it had been found that the Committee had been misled as to the scope of the amendment to regulation 27, which removed the original head (b) which had constituted a long stop. It was at least possible, he argued, that, had the Committee realised that some people would be adversely affected by the amendment, they would have required a formal referral.

28. Mr Collins accepted that if we held that the amendment to Activity 14 was valid the claimant could not fall within its scope. However, if we held that the amendment was invalid, then, he submitted, the decision of the Glasgow appeal tribunal should be set aside because the tribunal had failed to deal with Activity 14 at all and the case should go back to another tribunal for re-hearing. When it was suggested that there was insufficient evidence in the papers to support the claimant's case and he was asked what additional evidence would be available for the re-hearing, he said, after taking instructions, that there was no specific new material now, but that the matter would be investigated again to see what evidence might be available.

29. Mr Clark, for the claimant in CSIB/803/2005, had also put in a written submission which he supplemented in argument. His primary position was that the Greenock appeal tribunal had been correct to follow Mr Commissioner Jacobs' decision in R(IB) 3/04 and hold that the amendment to Activity 14 was not valid. In the alternative, he adopted Mr Collins' submissions, but further argued that the amendment was invalid because the amendment to Activity 14 was not the definition of an activity, but was the definition of an activity by reference to a specific disease or disability; the descriptors had to be of an activity and not of a disease or disability, which was unauthorised under section 171C(2) of the Social Security Contributions and Benefits Act 1992.

30. Finally, Mr Clark submitted that the tribunal had applied too strict a test in relation to "altered consciousness", failing properly to apply CSIB/14/1996, and he submitted that the appeal should go back to a new tribunal. However, he conceded

that, if the amendment to Activity 14 was valid, his client could not succeed on the facts.

### **Submissions for the Secretary of State**

31. Mr Brodie put in written and supplementary written submissions, which he further supplemented orally. The Secretary of State conceded that the Committee was given inaccurate information in that they were informed that the amendment to Activity 14 was neutral. He now accepted that it was not neutral, but he too submitted that that was not enough to show that the amendment was invalid. There was a difference of opinion with Mr Collins, however, on the proper approach to the question of invalidity. Mr Brodie submitted that the test of invalidity to be applied was not the test suggested by Mr Collins: the amendment could be held to be invalid only if the Commissioners were satisfied that the Committee had been, or at least probably had been, misled to the extent that it would not have agreed to there being no reference if they had not been misled. A mere real possibility was not, he submitted, sufficient. While it was accepted that some inaccurate information had been provided to the Committee, taking into account all the material available to it, it could not be said that the Committee had been misled to the extent that there would have been a different outcome had the correct categorisation been given.

32. In his written submission Mr Brodie said that the *ratio* of *Howker* was contained in paragraph [37] of the decision of Peter Gibson LJ and that it was clear from that passage that an amendment is invalid only where the following factors are present:

- (i) the Committee has been provided with obviously incorrect information as to the effect of a proposed amendment;
- (ii) that obviously incorrect information causes the Committee not to seek a formal referral of the proposed amendment;
- (iii) had the information been correct, the Committee would have required a formal referral;
- (iv) the Secretary of State then presents the proposed amendment to Parliament.

He submitted that each of those factors must be present before regulations, or an individual provision thereof, can be found invalid on grounds of procedural irregularity. Thus, the incorrect information must be found to have been the cause, or a material cause, of a decision by the Committee not to seek formal referral.

33. Mr Brodie also submitted that the terms “epileptic” and “seizure” in the amendment should be given their technical (ie medical) meaning, where the word “seizure”, as used in a medical context, denotes abnormal electrical activity in the brain (sometimes referred to as a paroxysmal discharge of cerebral neurones), which may lead to a variety of phenomena. It was of the essence of a seizure that there is abnormal electrical activity.

34. Mr Brodie agreed with Mr Collins that if the amendment were held to be invalid the appeal in CSIB/818/2005 should be allowed and remitted to a new tribunal for a re-hearing as the wrong test was possibly applied and the evidence may not have been properly explored. When asked whether there was sufficient evidence to justify referring the case back, he said that it was usual for a case to be remitted when a tribunal had erred in law. He did not support Mr Clark’s submission that the

Greenock appeal tribunal had erred in its approach to the unamended form of Activity 14.

## **Consideration**

### **The test of invalidity**

35. Insofar as the test of invalidity is concerned, we agree with both Mr Collins and Mr Brodie that it is not enough merely to consider whether the label of “neutral” applied to the proposed amendment of Activity 14 was correct, as appears to have been done in R(IB) 3/04. Rather, it is necessary to look at all the material placed before the Committee and consider whether the overall effect was misleading. Only then can it be said that the Secretary of State was in breach of his duty under section 170(4) of the Social Security Administration Act 1992 to provide information to enable the Committee properly to carry out its functions so that there was no “informed agreement” by the Committee not to require a formal reference of proposed legislation. In some cases, the impact of a label incorrectly describing a proposed amendment as “neutral” may be negligible because the description of the proposed amendment in explanatory notes makes its effect sufficiently clear.

36. Where they differ on this issue, we prefer Mr Collins’ submissions to those of Mr Brodie. We agree with Mr Collins that the mere fact that the Court of Appeal in *Howker* relied on the positive finding of the Commissioner that the inaccurate information led the Committee not to require a formal referral that it would otherwise have required does not necessarily lead to the conclusion that it would not have made the same decision if the Commissioner had not made such a finding. What was important to the Court was that there should be the “informed agreement” to which Peter Gibson LJ referred in [36]. In our judgment, the purpose of the legislation is shown to have been undermined if agreement was not informed because the material provided by the Secretary of State was not accurate. It is generally not desirable, and becomes increasingly impractical with the passage of time, for members of the Committee to be involved in the role of witnesses in litigation as to the validity of regulations and it is not appropriate for Commissioners to speculate as to how the Committee collectively would have reacted to information it was not given in cases where the answer may not be as clear as it was in *Howker* itself.

37. In practice, we suggest, a party seeking to show that a regulation is invalid on the ground that the Committee was given misleading information must show both that there is a real possibility that the information might have misled the Committee as to the effect the proposed regulation would have and that there is a real possibility that, had the Committee been aware of its true effect, it would have wished to have the proposed regulation formally referred to it.

### **The construction of the legislation and the validity of the amendment**

38. The validity of the amendment cannot be determined without consideration of its meaning and effect. Questions of validity generally go hand-in-hand with questions of construction. A provision that would be invalid on one construction may be valid if given a different construction and, where possible, a provision should be construed so that it is valid, even if that requires giving it something of a strained construction. These considerations are particularly relevant in a case like the present. An allegation that a Minister and his officials have misled a Committee that has an important role in the making of legislation is extremely serious.

39. Moreover, it is well established that it is permissible to look at reports by the Social Security Advisory Committee, which are usually published with the written material put before the Committee, as an aid to the construction of regulations that have been considered by the Committee, because the reports and the material provided to the Committee can reveal the mischief that the regulations were intended to cure and therefore throw light on the intention of the legislator. In this case, the amending regulations were not the subject of a report but the material we have been shown can, in our judgment, still be used as an aid to construction. It is important that it should be, because it ought not to be open to the Secretary of State to present a draft of regulations to the Committee on the basis that it means one thing and then, after they have been made, argue before a Commissioner that they mean something else. That would allow the Secretary of State to subvert the process. If he were to do that deliberately, concealing his real purpose and the true effect of the proposed amendment from the Committee, the Committee would have been misled and the regulations would be invalid. If he does it innocently, informing the Committee of his true purpose and presumably causing it to accept that the regulations will have the desired effect, but subsequently taking the view that they mean something else, a Commissioner should not lightly accept that alternative meaning (and the possibility of having to find the regulations to be invalid). If it is possible to construe the regulations consistently with the presumed understanding of the Committee, that construction should generally be given to them.

40. This relationship between the validity of a provision and its construction is important in the present case because the terms of the amendment are ambiguous. Mr Brodie submitted that the phrase “epileptic or similar seizures” was to be given a medical meaning and he referred us to Chapter 24.4 of the *Oxford Textbook of Medicine* (3rd (and not the most recent) edition, 1996) for the proposition that such episodes are characterised by a paroxysmal discharge of cerebral neurones. We are prepared to accept that, in modern medicine, the term “seizures” is limited to episodes characterised by such a discharge. However, the relevant definition in the *Oxford English Dictionary*, “[a] sudden attack of illness, esp. a fit of apoplexy or epilepsy”, is not so limited.

41. Whether terms that are used both in medicine and colloquially are to be construed in a strictly scientific and medical sense or in a looser colloquial sense depends on what the legislator intended, which is usually to be inferred from the context. Although there has never been any doubt that the term “epileptic ... seizures” must be read as a medical condition defined in the way that doctors would accept, Commissioners in Great Britain have not taken such a strict approach to the simple term “seizure” and have therefore construed “similar seizures” more loosely. Broadly the approach has been that “seizure” is capable of being understood by a layperson (and perhaps some doctors) as applying to episodes that do not involve the discharge of neurones in the brain and that similarity to epileptic seizures is to be judged by the effects of such episodes rather than by their cause or mechanism (see CIB/13739/1996, CIB/16122/1996, CIB/17021/1996, CIB/3721/1997, CIB/2104/1998, CIB/4598/2002, CSIB/196/2003 and CIB/1714/2003, in several of which cases the more technical approach taken in Northern Ireland by Mrs Commissioner Brown in C30/98(IB) has explicitly been rejected). In CIB/2104/1998, it seemed to Mrs Deputy Commissioner Ramsay that “the phrase ‘similar seizures’ is meant to imply something which is involuntary and is so overwhelming that it takes place whatever the affected person might do” and, in CIB/1714/2003, Mr Deputy Commissioner

White accepted that blackouts suffered by the claimant due to cough syncope were “seizures” because they were “of sudden onset and recurrence”. (The approach taken in CIB/2104/1998 to deciding what is involuntary may be inconsistent with R(DLA) 6/06 but that is not material to the present case. That the loss or alteration of consciousness must be involuntary is clear from the terms of the descriptors.)

42. Mr Brodie conceded that his construction would have the effect of excluding from the scope of Activity 14 those who suddenly lost consciousness due to, for instance, vasovagal syncope or cardiac syncope. We asked him what the policy justification for that might be and he was not able to provide an answer. He nonetheless submitted that Commissioners have been wrong to contrast “effect” with “cause” and should have given “seizures” its specific meaning “describing a constellation of clinical signs and symptoms”. However, it seems to us that Commissioners’ concentration on the practical effects of episodes rather than on what is happening invisibly in the brain is entirely understandable, given that Activity 14 is part of the personal capability assessment used to determine the practical question whether a person is capable of work. We prefer that approach to Mr Brodie’s.

43. Our preference is reinforced by consideration of the proceedings before the Committee. The commentary provided to the Committee gave no indication whatsoever that the Secretary of State intended that the word “seizures” should have a technical meaning and that seems to us to be significant when he must have known that no member of the Committee held a medical qualification with the consequence that the Committee would be likely to be unaware of the implication of the strict medical meaning. Moreover, if the Secretary of State had intended that the amendment should exclude from the scope of Activity 14 all those who suffered from lost or altered consciousness due to any cause other than “seizures” in the strict medical sense, it is difficult to see how he could, in good faith, have described the amendment as “neutral” and it is even more difficult to see how he could, in good faith, have confined his comments about the purpose of the amendment to dealing with cases of dizziness, vertigo and giddiness when he really intended also to exclude from the scope of Activity 14 some people who were liable suddenly to lose consciousness altogether. The question we asked about the policy justification for excluding from the scope of Activity 14 those suffering from vasovagal syncope or cardiac syncope is just the sort of question the Committee might have asked and, if they had asked it and the answer had not satisfied them, they might well have declined to agree to that proposal not being formally referred to them. If Mr Brodie’s construction of the amended version of Activity 14 were correct, we would therefore be inclined to find the amendment to be invalid and, indeed, we might even conclude that the Secretary of State had been guilty of “sharp practice” similar to that found in *Howker*.

44. However, we can put the point the other way round. The lack of any mention of the technical definition of “seizures” undermines the contention that that is what was intended. If the looser approach to the meaning of “seizures” was intended and one feature of “similar seizures” is that they are sudden, the information provided to the Committee in the commentary does not appear to us to have been misleading at all, save possibly for the label of “neutral”.

45. The context in which the amendment was proposed is extremely important. The policy behind the Secretary of State's assertion to the Committee that he had always intended that Activity 14 should cover only those who suffered seizures is fairly obvious. A finding that a person satisfies the personal capability assessment usually results in an indefinite award of benefit and, generally speaking, such a finding is appropriate only if a person is disabled most of the time. Activities 13 (incontinence) and 14 provide exceptions in that, for instance, a person scores 15 points (enough, by itself, to be treated as incapable of work) under descriptor 14(c) if he suffers an episode of lost or altered consciousness at least once a month. The only other exceptions in Part I of the Schedule to the 1995 Regulations are in descriptors 5(c) and 6(c) in respect of each of which a person can score three points if he or she "sometimes" cannot carry out the relevant activity. Otherwise, intermittent disability does not lead to the scoring of points under Part I of the Schedule, save during a period when the person actually has a reduced ability to perform activities (when the likelihood is that a claimant will not be assessed under the Schedule anyway, due to the shortness of the period of incapacity, and will instead be treated as incapable of work by virtue of regulation 28 of the 1995 Regulations). The explanation for the exceptions in Activities 13 and 14 is presumably that loss of control of bowel or bladder and loss or alteration of consciousness can happen suddenly, which creates obvious additional difficulties in the workplace. Thus, it can readily be accepted that the original intention behind Activity 14 was that it should be confined to cases where the loss or alteration of consciousness was sudden and that the purpose of the amendment was to make that clear by use of the word "seizure". There is no obvious reason why a person who suffers a severe and disabling migraine on one day a month should be treated as incapable of work for the whole month, any more than is a person who is confined to bed by a severe back condition on one day a month. Both people would clearly be incapable of work on the one day but could reasonably be expected to work for the rest of the month.

46. Mr Brodie's concession that the amendment was not "neutral" was necessary because of the construction he placed on the amendment and, of course, it was an essential part of Mr Collins' and Mr Clark's cases that the amendment should not be "neutral", because otherwise it would be valid. However, if the context in which the original version of Activity 14 was enacted is borne in mind and if Mr Brodie's construction of the amendment is rejected in favour of a looser meaning of the word "seizures", it is possible to see how the amendment could, in good faith, have been described as "neutral". It has to be remembered that, at the time the Committee considered these proposals, no, or no significant, Commissioner's decision had been given in respect of Activity 14. It was therefore still open to the Secretary of State to argue that, if the original version of Activity 14 was read in its proper context, the term "altered consciousness" had to be construed as meaning consciousness altered to the extent that the person concerned was not capable of any deliberate act (as in a *petit mal* episode) and that "episode" had to be construed as meaning a sudden event. On that basis, the amendment would have been "neutral".

47. When Commissioners in Great Britain did come to make decisions on the original version of Activity 14, the amendment had already been made. In, for instance, CIB/13739/1996 and CIB/3721/1997, Commissioners accepted arguments made on behalf of claimants to the effect that "altered consciousness" could, in some circumstances, embrace vertigo and dizziness. However, they did not define the circumstances in which that could be so with any precision, preferring to leave that to

the expertise of tribunals, although in the first of those cases, Miss Deputy Commissioner Fellner, as she then was, referred to “severe attacks of vertigo, where the surroundings suddenly and without warning spin round so that the sufferer loses perception of his environment, and may lose control of his balance and fall over” as events that might qualify as “episodes of ... altered consciousness”. In CSIB/14/1996, Mr Commissioner Walker QC set aside the decision of a tribunal that had limited the scope of “altered consciousness” to cases where claimants had their consciousness disturbed to the extent that would be the case where claimants “suffered from post-traumatic shock, petit mal epilepsy or possibly hypoglycaemic episodes of a diabetic who had failed to take appropriate medication”. He considered that it was impossible to lay down guidelines as to what did amount to “altered consciousness” and referred the case to another tribunal. Essentially, he held the tribunal to have erred because he found its reasoning unclear, but the implication of referring the case to another tribunal was that he accepted that a claimant suffering from severe headaches that caused him to lie down might be considered to suffer from altered consciousness. It is therefore not surprising that claimants’ representatives, including Mr Clark, have regarded the decision as being of some help to them. However, in our judgment, CSIB/14/1996 was wrongly decided. We prefer the approach of the then Chief Commissioner in Northern Ireland, His Honour Judge Chambers QC, who held in C13/96(IB) that “a person has an involuntary episode of altered consciousness when he has reached a state of mental confusion such that he is no longer properly aware of his surroundings or his condition”, which he thought was most likely where a person suffered epilepsy or diabetes. That is, in effect, the view that was taken by the tribunal in CSIB/14/1996 and it is plain that both the Chief Commissioner and that tribunal had in mind a person whose consciousness was so altered that they were not capable of any deliberate act. The Chief Commissioner accepted “that a particularly severe attack of vertigo” might qualify, thus anticipating CIB/13739/1996, but he made it clear that merely losing **some** control of one’s actions due to vertigo was not enough. We consider that this strict approach to the phrase “altered consciousness” was appropriate under the original version of Activity 14 and the meaning was not, of course, affected by the amendment.

48. On the other hand, apart from in CIB/13739/1996, Commissioners appear not to have regarded the suddenness of onset as a necessary element of an “episode of lost or altered consciousness” (even though that might be the practical effect of taking a strict approach to the meaning of “altered consciousness”) and so we are prepared to accept for the purposes of this decision that the description of the amendment as “neutral” was inaccurate even if Mr Brodie’s construction is rejected.

49. However, if Mr Brodie’s construction of the amendment is rejected, we regard that inaccuracy in the label given to the amendment as being of no significance in the light of the other information before the Committee. The effect of the proposed amendment was plainly set out in the commentary. It was made clear in the commentary that there was at least doubt about the interpretation of the original version of Activity 14 and that, whether or not they were excluded under the original version, it was intended that those who did not suffer seizures would be excluded from the scope of Activity 14 under the amendment. Moreover, it is plain from paragraph 3.4 of the minutes that the Committee was alive to the possibility that some of the labelling might be inaccurate.

50. It is true that the commentary referred only to those suffering from dizziness, vertigo and giddiness and did not make specific reference to any people who might lose consciousness altogether without suffering from anything that might amount to a seizure, who would also be excluded from the scope of Activity 14. However, it is easy to understand why the commentary concentrated on dizziness, vertigo and giddiness. It was, as the commentary said, being argued by claimants at the time that dizziness and vertigo could amount to altered consciousness and those submissions, some of which were subsequently accepted by Commissioners as we have noted, were leading to fears that the scope of Activity 14 was being widened, which was why the amendment was being proposed. The question is whether the effect of referring only to dizziness, vertigo and giddiness was to mislead the Committee because it is possible that people who suffer from other conditions might also be adversely affected by the amendment.

51. In our judgment, although an omission may have a misleading effect, some care needs to be taken before finding that the Committee has been misled by an omission. One role of the Committee is to draw the Secretary of State's attention to possible unintended consequences of proposed legislation and we do not consider that legislation can be regarded as invalid merely because the Secretary of State has apparently overlooked a point and the Committee has said nothing about it either. The Secretary of State can be said to have misled the Committee by omission only if he was under a duty to provide the information and there must be a limit to the level of detail to which he is obliged to descend. We accept Mr Brodie's point that members of the Committee are to be taken to have considerable expertise and to be neither passive nor naïve. Members of the Committee are also likely to do some preparatory work before a meeting, so as to have a broad understanding of the context in which new regulations are proposed, and are likely to understand the significance of most proposed regulations notwithstanding minor inaccuracies or omissions in the information provided. They are also likely to ask questions if in doubt.

52. What is important in this instance is that, from the terms of the draft amendment itself and from the commentary, the Committee could see for themselves that only those who suffered from seizures would be within the scope of Activity 14 when the amendment came into force. The commentary was plainly not intended to be a detailed policy document dealing with all possible issues and it had to be read with the draft regulation. When the two documents are read together, it is impossible to say that the Secretary of State misled the Committee or was in breach of his duty to furnish the Committee with such information as it might reasonably require, provided that the word "seizures" was not intended to be understood only in its technical sense. The point that there might be some people who would suffer from a condition causing them to lose consciousness without experiencing a seizure and that those people would be excluded from the scope of Activity 14 was implicit in the material before the Committee and members could have asked about it had they wished. If they overlooked the point, that was not, in our judgment, because they were misled by the information in the commentary.

53. That distinguishes this case from *Howker*. In *Howker*, there was a clear misrepresentation in the commentary as to the extent to which the amendment differed from the original version and the true position could be discovered only if the amendment was compared carefully with the original provision despite the implication of the commentary being that such a careful comparison was

unnecessary. Here, the fact that people who did not suffer seizures were to be omitted from the scope of the amended Activity 14 was abundantly clear from the material provided to the Committee as was the fact that there were at least different views as to whether such people were anyway outside the scope of the original version.

54. We are also not satisfied that the answer of Dr Sawney recorded at paragraph 3.6 of the minutes was misleading. It is important to bear in mind that such minutes are not intended to be a verbatim record of discussions and in those circumstances it is inappropriate to imply too much into what has not been recorded. Moreover, we do not consider that the Committee could reasonably have thought that it was being suggested that all those excluded from the scope of Activity 14 would always score an equivalent number of points under other activities. There would have been no need to ensure that they were outside the scope of Activity 14 if they would score the same points in respect of other activities. We accept, of course, that Dr Sawney appears not to have mentioned that there might be some people who lose consciousness without suffering from a seizure. However, we are not satisfied that he thereby misled the committee. He was not asked generally about people who might lose consciousness without suffering from a seizure. The chairman had specifically queried the apparent exclusion of those suffering from dizziness and vertigo – which had, of course, been intended as an aspect of the policy behind the original version even if the drafting of that version was defective – and Dr Sawney’s answer was not inaccurate. Some people suffering from dizziness or vertigo may score points under other activities because the dizziness or vertigo from which they suffer may not be intermittent or may occur most of the time when they are carrying out certain activities such as walking or climbing stairs. It was implicit, and may even have been made explicit in the course of discussion, that the Secretary of State considered that those less frequently affected by dizziness or vertigo were rightly to be regarded as capable of work if they were not suffering from other conditions.

55. We reject Mr Collins’ additional submission that the misrepresentation as regards the effect of the amendment to regulation 27 infected everything else in the commentary. It might have done if the amendment to regulation 27 had actually been effective in removing the original head (b), but in *Howker* it was held not to be and so the long stop remained in position.

56. We conclude that, provided Mr Brodie’s construction of the amendment is rejected so that the word “seizures” is to be construed as meaning episodes that are involuntary, overwhelming and sudden and the phrase “similar seizures” is to be construed by reference to the similarity of the **effects** of the seizures to epileptic seizures, including the degree of suddenness of the loss or alteration of consciousness but without consideration of whether the seizures are characterised by the discharge of cerebral neurones, the amendment to Activity 14 is not invalid on procedural grounds. This, together with our view that drawing a distinction between events characterised by electrical activity in the brain and other sudden losses or alterations of consciousness makes little sense, leads us to the clear conclusion that Mr Brodie’s construction must be rejected.

57. We reject the submission made by Mr Clark that the amendment is invalid because section 171C(2)(a) of the Social Security Contributions and Benefits Act 1992 permits the personal capability assessment to be defined only by reference to the extent to which a person is incapable of performing prescribed activities and not

by reference to the condition from which the person is suffering. It is not in issue that remaining conscious can be an “activity” for the purpose of that enabling provision and, in our judgment, the amendment – at least as we have construed it – merely defines the type of remaining conscious that the activity includes and is plainly within the scope of the enabling provision.

58. We are satisfied that, correctly construed, the amendment to Activity 14 is valid and that Mr Commissioner Jacobs was wrong to hold otherwise in R(IB) 3/04. However, we observe that the claimant in R(IB) 3/04 had been found to fall within the scope of the unamended version of Activity 14 as a result of losing consciousness due to cough syncope and we consider that it is likely that he would have been found to fall within the scope of the amended Activity 14 had the correct test been applied.

#### **Application of our determination of the points of law**

59. If, as we consider should have been done, a stricter approach had been taken to the meaning of “altered consciousness” when considering the scope of the descriptors within the unamended version of Activity 14, we suspect that there are few people who would have fallen within the scope of the original version of Activity 14 but not the amended version. However, the amended version certainly simplifies adjudication, as was intended, because there is less scope for argument about what amounts to an “epileptic or similar seizure” than there is about whether a person experiences “altered consciousness” or about the meaning of “normal periods of sleep”.

#### **CSIB/803/2005**

60. We dismiss this appeal. We are not satisfied that the Greenock appeal tribunal erred in its approach to the question whether the claimant had episodes of altered consciousness or that its findings of fact are flawed by inadequate reasoning. Mr Clark criticised the tribunal for stating that it “was simply a matter of choice on her part” that the claimant did not answer the doorbell or the telephone. However, in our judgment, the tribunal did not mean that the claimant could reasonably have been expected to answer the doorbell or the telephone but only that her consciousness was not so altered that she would have been absolutely incapable of doing so. That was a finding it was entitled to make and it was relevant to the issue the tribunal had to decide.

61. We also do not accept Mr Clark’s other criticisms of the tribunal’s decision. The discrepancy between the 2–2½ hours in the findings of fact and the 1–1½ hours in the reasoning is plainly a slip. The tribunal was entitled to note the absence of “vomiting or other symptoms normally associated with severe migraines” and it does not follow that the tribunal considered that such symptoms were universal or that it found that she did not suffer from migraines. The tribunal was also entitled to find that “she had chosen not to take any drug specifically targeted at migraine pain”. That was not inconsistent with its finding that she took paracetamol, because paracetamol is an analgesic that is effective for a wide range of conditions and is not a drug that is used only or mainly to combat migraine pain.

62. The tribunal did, of course, err in holding the amendment to Activity 14 to be invalid, although it cannot be blamed for following R(IB) 3/04, but the error is of no significance because, had it not erred, it would have been obliged to find that the claimant did not suffer from anything that could properly be described as a seizure,

which would have been an additional reason for rejecting the claimant's appeal against the Secretary of State's decision.

### CSIB/818/2005

63. We dismiss this appeal too, although we accept Mr Orr's written submission that the tribunal's statement of reasons is unsatisfactory, both because the tribunal did not adequately address his submission that the amendment to Activity 14 was invalid and because its rejection of an argument that the claimant fell within the scope of regulation 27 was expressed in such broad terms that it is unclear whether the tribunal had regard to the decision in *Howker* that the amendment to regulation 27 was invalid. We dismiss the appeal because that lack of clarity in the reasoning is immaterial. As Mr Collins conceded, the claimant's medical condition did not cause him to suffer from anything that might properly be described as seizures and therefore, in the light of our finding that the amendment to Activity 14 is valid, the claimant was plainly not entitled to any points under that Activity. In relation to regulation 27, we agree with the written submission of the Secretary of State that there was no evidence before the tribunal that there would have been "a **substantial** risk to the mental or physical health of any person" (our emphasis) if the claimant were to be found capable of work and so it is clear that the tribunal could not have found the claimant to have fallen within the scope of regulation 27. That submission has not prompted any suggestion that there might now be some further material evidence.

64. Our decision in this case raises two general points upon which we wish to comment.

65. First, the ambiguity in the tribunal's decision as regards regulation 27 seems to us to be a result of the confusion that can be caused if what appears on the page of the statute book does not represent the true state of the law. In our view, where an amendment is held to be invalid or to be only partially valid and the decision to that effect is not challenged by the Secretary of State, it would be desirable for the Secretary of State to introduce a further amendment to give effect to the decision.

66. Secondly, there appears to be some misunderstanding by Counsel as to the duty of Commissioners to refer cases to tribunals for rehearing where errors of law have been found. It is clear from the terms of section 14(8) of the Social Security Act 1998 that a Commissioner who has held a tribunal to have erred in law need refer the case to another tribunal only if he or she is not able properly to deal with any outstanding factual issues and the points of law arising out of them. We accept that the consequence of a tribunal erring in law is frequently that the tribunal has failed to adduce all the material evidence in a case and, of course, where a Commissioner is determining an appeal without an oral hearing, it may be unduly time consuming to ask whether there might be any further evidence. There are also cases where the facts are in dispute, the tribunal's findings are tainted by the error of law and either it is inexpedient for a Commissioner to hold an oral hearing to resolve the dispute or the case ought to be referred to a tribunal that will have a doctor or other specially qualified person among its members. For those and other reasons, it is often necessary for cases to be referred to another tribunal at the conclusion of a successful appeal to a Commissioner.

67. However, in this case, the claimant had an experienced representative before the tribunal who could be expected to ensure that the tribunal was told of all facts

upon which the claimant might rely. The claimant put a medical report before the tribunal and the chairman took a lengthy note of the claimant's own oral evidence. The claimant's representatives were unable to tell us of anything that was not recorded in the note of evidence or elsewhere in the papers that might assist the claimant in establishing his case under the unamended version of Activity 14 or the unamended version of regulation 27. On the other side, Mr Brodie did not concede that the claimant would have scored 15 points under the unamended version of Activity 14 or that he would have fallen within the scope of the unamended version of regulation 27, but neither did he suggest that the Secretary of State's case in relation to those issues would have turned on any dispute about the evidence given to the tribunal. In all these circumstances, this was not a case that needed referring to a tribunal for the resolution of any issue of fact unless some new issue emerged.

68. There is no serious question of the claimant falling within the scope of regulation 27, which is why we have been able to dismiss this appeal despite the ambiguity in the tribunal's reasoning as to which version of the regulation it had considered.

69. If we had found the amendment to Activity 14 to be invalid, it is apparent that there would have been a dispute between the parties as to whether, if the claimant's evidence were accepted in full, he should be found to fall within the scope of the unamended version of Activity 14 and its descriptors. It is clear to us, as it apparently was to Mr Orr before the tribunal, that the claimant's headaches were not such as to amount to "episodes of ... altered consciousness" in this case any more than they were in CSIB/803/2005. It is also clear to us that the claimant did not suffer from narcolepsy, which Mr Collins, rightly in our view, suggested in his written submission was what Mr Commissioner Walker QC may have had in mind when referring to "irresistible sleep" in CSIB/44/1997. The medical report submitted to the tribunal merely referred to the claimant being "sleepy" as a result of his medication and the claimant himself merely told the tribunal that he felt "dozy". We might well have accepted that a person who regularly feels sleepy during the day due to his medication will actually fall asleep, at least occasionally, and that those would be "episodes of lost ... consciousness", whereas mere sleepiness or doziness is not "altered consciousness". However, that would have raised the question whether such periods of sleep were "normal", which Mr Orr correctly identified as the relevant issue before the tribunal. That would have been largely a question of law and one that we would have wished to resolve. Referring the case to another tribunal would have given the impression that we accepted that the claimant had some prospect of success, when we had not in fact given proper consideration to the point. Equally, it would have suggested that the Secretary of State also had some prospect of success. That would have been unsatisfactory unless we had been able to suggest to the tribunal what further findings of fact might be necessary. We would therefore have required further submissions on the meaning of "normal periods of sleep" before considering whether to refer this case to another tribunal. Only if our ruling on that point of law made it apparent that it was necessary to receive further oral evidence would we have contemplated referring this case to another tribunal. We would then have been in a position to give adequate directions to the tribunal.

