IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

Appeal No. CDLA/2971/2008

Before Mrs. A. Rowley sitting as a Deputy Judge of the Upper Tribunal

Decision: Appeal allowed

REASONS FOR DECISION

1. The claimant made a new claim for Disability Living Allowance ("DLA") which was issued on 9 July 2007 and received on 29 August 2007. He said that he had arthritis in most joints, a duodenal ulcer, and migraine. The claimant described the following:

   1.1. He said that he could normally walk 75 yards before feeling severe discomfort, and it would take him 2 – 3 minutes to walk that distance, walking slowly to avoid jarring his back and getting progressively slower as the pain increased. He said he walked with a pronounced limp, and sometimes staggered because of the pain; his joints could lock. When his joints locked, he said he often stumbled.

   1.2. He needed someone with him to guide or supervise him when walking outdoors in unfamiliar places. He said he suffered headaches every day, which affected his vision, and could cause blindness in his right eye. He said that he needed to sit and close his eyes until able to return home.

   1.3. He described his care needs. Further, as to cooking, he said that his joints could lock unexpectedly. He had to use both hands to lift a pan, and could easily drop it. As his hands were arthritic he struggled to peel vegetables, and to use taps and openers etc. The claimant said that his back was painful, so he would be at risk if lifting anything hot from the oven.

2. A medical report dated 13 September 2007 was obtained from the claimant's GP. He said that the claimant had chronic headaches, which were mild/moderate, and that the condition varied from day to day, as far as he knew. The GP said that the claimant was able fully to self care, had insight and awareness of danger, and was fully able to get around (taking into account pain, gait, balance, breathlessness and visual loss). There was no mention in the GP's report of arthritis.

3. On 20 November 2007 a decision maker decided that the claimant was not entitled to an award of either component of DLA at any rate from and including 9 July 2007.

4. The claimant appealed to an appeal tribunal. The tribunal's hearing of the claimant's appeal took place on 21 July 2007. The claimant had requested an oral hearing. He did not attend, but the record of proceedings suggests that he was represented by his representative.

5. As he was unable to attend the hearing (because, he said, he would not be able to give evidence if he did, as he would be incapacitated by migraine, the experience being too stressful for him), he submitted a questionnaire which he

had completed. His representative produced written submissions. Taken together, the written submissions and questionnaire referred to the following:

5.1. The claimant suffered from chronic headaches/migraine, duodenal ulcer and arthritis in most joints.

5.2. The claimant claimed the mobility component at the higher or lower rate. He said that he could walk 400 yards before he experienced severe discomfort, due to breathlessness and pain in the knees; after 100 yards he wanted to stop, and would have to push himself.

5.3. In relation to the lower rate, the submission said that his headaches were brought on by any stressful situation, and always occurred when he strayed from familiar surroundings. In his questionnaire, in response to the question whether he needed someone with him when outside, particularly in unfamiliar places, the claimant said that he did so only if he got stresses, as then he would have a headache. He explained that when he got a headache his vision was affected, and he had to sit, rest and close his eyes. The claimant said that he was vulnerable at such times. A five minute rest would make it slightly better, and he would try again, but he may have to stop three or four times before he got home. The claimant stated that he tried not to go too far because of this. He said that he was afraid to go anywhere noisy or stressful, as he knew it would trigger a migraine.

5.4. The claimant claimed lower rate care, under either limb of section 72(1)(a) of the Social Security Contributions and Benefits Act 1992. He said that he needed help with personal care as his hands were stiff, because of arthritis.

5.5. in his questionnaire, the claimant described how he fed himself with salads, frozen fish, chicken, frozen vegetables, and new or jacket potatoes. He explained that he did not peel vegetables, and did not know if he could do so without cutting himself; he would have to do it very slowly. He said that his right elbow was painful, so it was difficult to lift and drain. It was submitted that he would fail the cooking test, both because of the limitations imposed on his joints by arthritis, and also because any stress would bring on a severe headache, rendering him unsafe.

5.6. The claimant explained that the reason his GP's report did not mention arthritis was because his previous GP had told him that arthritis was something that came with age and that he "just had to get on with it." Accordingly, he had not bothered his current GP with it, but just took paracetamol and tried to rest the parts affected.

The appeal tribunal's findings

6. The tribunal disallowed the appeal, and confirmed that the claimant was not entitled to either component of DLA at any rate, from and including 9 July 2007. The tribunal provided a Statement of Reasons. It found that the claimant suffered from chronic headaches. However, the tribunal found that, given the level of pain that the claimant said he suffered, and the problems which he said were caused in his daily life because of it, his explanation as to why his GP's report had not mentioned arthritis was "highly unlikely." The tribunal noted that the claimant had not been prescribed any of the specific drugs for the treatment of migraine or arthritis, or any painkillers whatsoever. It did, however, note that

the claimant was being treated with Atenolol which was sometimes used as a preventative for migraine.

Higher rate mobility component

7. Applying *Harrison v Secretary of State for Social Services* (reported as an appendix to *R(M) 1/88*) and *R(DLA) 4/06* (which held that, in order to succeed in a claim for the higher rate of the mobility component of DLA a claimant must show that his inability to walk outside has some physical cause) the tribunal found that there was no compelling evidence that the claimant suffered from a physical disorder which was current at the date of the decision and which affected his ability to walk. The tribunal preferred the GP's evidence that the claimant was fully able to walk, as this was consistent with his diagnosis and prescribing pattern.

8. There is no ground of appeal relating to this part of the tribunal's decision.

Lower rate mobility component

9. The tribunal noted what the claimant had said in his claim pack and questionnaire. However, it found that the GP's evidence that the claimant was fully able to walk was more likely to be correct, because it was consistent with his diagnosis and prescribing pattern.

10. The tribunal found it difficult - on what it expressed to be the limited evidence before it – "to see how a headache and disturbed vision in one eye could give rise to a need for guidance and supervision particularly when a five minute rest gives rise to an improvement." The tribunal said that it was not convinced on the evidence that the claimant needed guidance and/or supervision most of the time.

11. The tribunal took the view that, although when he was stressed the claimant was anxious when walking outdoors, this anxiety was not a symptom of a mental disability which was so severe as to prevent him from taking advantage of the faculty of walking out of doors without guidance or supervision. The tribunal concluded that, although the claimant may well derive reassurance from being accompanied whilst walking out of doors, there was no compelling evidence that he needed to be accompanied by someone to monitor him, such that his ability to take advantage of the faculty of walking was not compromised, nor did he need measures more active than monitoring to enable him to take advantage of the faculty of walking out of doors.

Care component – care needs

12. In relation to the claimant's care needs, the tribunal concluded that he did not satisfy the criteria for the care component at any rate. It is not suggested that the tribunal's decision on this issue can be challenged as being erroneous in point of law.

Care component – cooking test

13. The tribunal found that on the claimant's own evidence he could plan and prepare a main meal for himself, and if fresh rather than frozen vegetables were to be used, he could peel and chip them, albeit slowly. The tribunal went on to find that he could prepare a main meal for one without using a traditional oven, and without lifting hot pans by means of slotted spoons and wire baskets.

<u>The appeal to the Upper Tribunal</u>

14. The claimant appeals to the Upper Tribunal with the permission of the Judge of the Upper Tribunal. The Secretary of State does not support the appeal. Three grounds of appeal are relied upon, and I will deal with each in turn.

Lower rate mobility component

15. The claimant submits that the tribunal have dealt inadequately with the evidence available, and as a result he submits that their findings of fact are flawed. The claimant accepts that there is not a mental health issue. Rather, he contends, the point is whether any venture to unfamiliar surroundings would result in a chronic headache, in turn resulting in poor balance and vision, and the claimant having to sit with eyes closed for about five minutes. The claimant submits that it would be readily apparent that this would make him vulnerable if unaccompanied, particularly in unfamiliar surroundings.

16. The Secretary of State submits that the tribunal did adequately explain why it found that the claimant had not demonstrated that the entitlement conditions of this component had been satisfied.

17. It is apparent from the observations of the Commissioner (now a Judge of the Upper Tribunal) in *CDLA/1639/2006* that the effect of migraines on a claimant's vision may be relevant when considering the lower rate mobility component. In my judgment the tribunal failed adequately to explain its view that it could not "see how a headache and disturbed vision in one eye could give rise to a need for guidance and supervision particularly when a five minute rest gives rise to an improvement." It seems to me that at first glance it is fairly obvious how a headache and disturbed vision could give rise to a need for guidance and/or supervision. If the tribunal thought that this was not the case, it should have explained why. In failing to do so, in my judgment it erred in law.

Cooking test

18. Section 72(1)(a)(ii) of the Social Security Contributions and Benefits Act 1992 confers entitlement to lowest rate care component on a person who is so severely disabled physically or mentally that he cannot prepare a cooked main meal for himself if he has the ingredients. It is clear from that wording that the ability to prepare a cooked main meal is intended as a measure of the severity of physical or mental disability.

19. The test is "a notional test, a thought-experiment, to calibrate the severity of the disability" (Lord Hoffman in *Moyna v Secretary of State for Work and Pensions* [2003] 4 All E.R. 162).

20. The claimant cites *CDLA/1714/2005*, in which it was said that the focus of the tribunal's enquiry must be on the effects of any disability on the claimant's ability to cook a main meal, rather than on ways in which those effects can be overcome; and Lord Hoffman's thought experiment has to be directed at the claimant's ability to carry out the activities required to cook a main meal, rather than at some imaginary kitchen equipment catalogue. In that case, the Commissioner went on to say that in cooking a main meal, typically it is necessary to (amongst other things) move pans from one burner or electric ring to another.

21. The claimant submits that the tribunal failed to give reasons for its suggestion that the claimant could make use of slotted spoons and wire baskets. In contrast, the

Secretary of State submits that the tribunal did not err in law in its consideration of the cooking test. He contends that the medical evidence regarding the type of disabilities for which the claimant received treatment from his GP gave no indication that the claimant had a disability which impeded on the use of his upper limbs, and that there was no evidence in the medical report that the claimant would be unable to peel or cut enough vegetables for one person. The Secretary of State further submits that "it has long been accepted that a slotted spoon can be used to remove food from hot pans which can then be left to cool."

22. Whilst if it is asserted that a claimant cannot lift a pan of hot water safely, account can be taken of any ability which the claimant may have to use a slotted spoon to remove vegetables from the pan (see, for example *CDLA/5686/1999)*, nevertheless it seems to me that there was no express evidence upon which the tribunal could base its comment that the claimant could use slotted spoons and wire baskets. In this regard, also, the tribunal erred in law.

Natural justice

23. The claimant's representative says that she was asked briefly by the tribunal if she had any comments, and was then told to wait in the waiting room. She says that she expected to be called back to give evidence if necessary, but was not afforded that opportunity; rather she was merely presented with the tribunal's decision. Given my conclusion that – on other grounds – the tribunal erred in law and the case must be remitted for a re-hearing by a new tribunal, I do not propose to consider this ground further. Of course, at the outset of the next hearing, the claimant's representative must make it clear to the tribunal whether or not she intends to give evidence and/or make oral representations on his behalf.

Conclusion

24. For the reasons set out above, in my judgment the tribunal erred in law and its decision must be set aside. It is not appropriate for me to substitute my own decision for that of the tribunal, not least because I am of the view that further medical evidence is required. Given the conflict between the claimant and the GP as to whether or not the claimant has arthritis, it seems to me that the new tribunal will be assisted by an EMP's report. (It may be that one has already been obtained in relation to the claimant's later claim).

25. The new tribunal must consider whether or not the claimant is entitled to an award of DLA under either component at any rate. I note that the claimant made a further claim for DLA with effect from 23 July 2008, and that on 4 September 2008 he appealed against a decision that he was not entitled to the benefit. If that appeal has not yet been heard, the papers should be referred to a District Tribunal Judge, who may wish to consider whether or not the appeals should be heard together.

Mrs. A. Rowley

Deputy Judge of the Upper Tribunal

20 March 2009