

★ 7/1/95

MR/SH/6

Commissioner's File: CDLA/805/94

SOCIAL SECURITY ACTS 1975 TO 1990
SOCIAL SECURITY ADMINISTRATION ACT 1992

CLAIM FOR DISABILITY LIVING ALLOWANCE

DECISION OF THE SOCIAL SECURITY COMMISSIONER

[ORAL HEARING]

1. I allow the claimant's appeal. The decision of the Plymouth disability appeal tribunal dated 3 November 1993 is erroneous in point of law. I set that decision aside and I refer the case to a differently constituted tribunal for determination.

2. This is an appeal, brought with my leave, against a decision to the effect that the claimant was entitled to the lowest rate of the care component of disability living allowance from 4 February 1993 for life. At the oral hearing of the appeal, the claimant appeared in person and the adjudication officer was represented by Mr D Hewitt of Counsel, instructed by the Solicitor to the Departments of Social Security and Health.

3. Before I explain why I allow this appeal, I must deal with an important procedural point. At an early stage in these proceedings, I was informed that the claimant had asked for a review of the tribunal's decision. I asked the adjudication officer for a further submission dealing with the relevance of that application to the present proceedings. I duly received a submission dated 14 July 1995 from which I understand that, on 10 August 1994, an adjudication officer found that there were grounds for review but decided that the tribunal's decision should not be revised. The claimant asked for a further review and, on 22 October 1994, a second adjudication officer reviewed, but did not revise, the decision on 10 August 1994. The claimant appealed and, on 5 July 1995, a disability appeal tribunal adjourned consideration of that appeal pending my decision.

4. The adjudication officer who gave the decision on 10 August 1994, the adjudication officer who gave the decision on 22 October 1994 and the adjudication officer who made the submission to me dated 14 July 1995 have all asserted that the power to review the tribunal's decision was conferred by section 30(2) of the Social Security Act 1992. As Mr Hewitt accepted, that is plainly wrong. Section 30 is concerned with

reviews of decisions of adjudication officers. The power to review a tribunal's decision is conferred by section 35(1). Section 35(1) is similar to section 30(2) in its terms, but one important difference is that a decision of an adjudication officer may be reviewed on the ground of error of law but a decision of a tribunal may not be reviewed on that ground.

5. In her submission dated 14 July 1995, the adjudication officer wrote:-

" 4. In my submission, the review of 10.8.94 is of no effect, since the tribunal's decision in respect of the mobility component has not been revised. I therefore submit that the tribunal's decision is still current and effective. If the tribunal dealing with the appeal against the review decision dated 22.10.94 have indeed adjourned to await the outcome of the Commissioner's appeal, I submit that this was the only course of action available to them. Although there is no provision to prevent a review of a tribunal decision proceeding at the same time as an appeal of the same decision to the Commissioner, in my submission a pragmatic approach may need to be adopted. In section 32(7) of the Administration Act, provision is made that a review of a decision appealed to a tribunal is of no effect unless it is the same as a decision allowing every ground of appeal. In the present case, since nothing changed on review, I submit that it is of no effect.

5. The claimant's contention in his appeal to the second tribunal is that his mobility has been affected since at least 1987. I therefore submit that in addition to looking at deterioration since the first tribunal's decision was made, the second tribunal are being asked to consider whether the first tribunal's decision was erroneous in point of law. As any such consideration is outside their jurisdiction, I submit that it is not unreasonable for proceedings to be adjourned pending the outcome of the present appeal to the Commissioner.

6. Should the Commissioner accept my submission, and the submission dated 2.3.95, I respectfully request that he set aside the decision of the tribunal dated 3.11.93 and remit the case for rehearing. In that event I submit that it would be appropriate for this and the outstanding appeal to be heard by the same tribunal."

7. I consider that paragraph 5 of the adjudication officer's submission is misconceived. I agree that the tribunal's decision could not be reviewed on the ground of error of law (due to the terms of section 35(1) of the Social Security Administration Act 1992) but, to the extent that the claimant alleged that his mobility had been affected since 1987, it was open to him to ask for the tribunal's decision to be reviewed under section 35(1)(a) on the ground of ignorance of, or mistake as to, a material fact.

8. I find paragraph 4 of the adjudication officer's submission

confusing. That is partly because it is difficult to tell what the adjudication officer means by something being of "no effect". That phrase could refer to something being a nullity or could refer merely to it having no, or limited, practical consequences. Furthermore, the adjudication officer does not explain what she means by "a pragmatic approach" and I do not understand the point of her reference to section 32(7) of the Social Security Administration Act 1992 which she appears to accept has no direct application where there is a review while an appeal is pending before a Commissioner. Nevertheless, I think my approach may not be very different from that intended by her.

9. In my view, it is important to bear in mind that, because an appeal to a Commissioner lies on a point of law only, a wholly unsuccessful appeal leaves a tribunal's decision unaffected. I do not consider that there can be any absolute bar against an adjudication officer reviewing and revising a tribunal's decision while an appeal is pending against the same decision, even if the claimant does not obtain on the review everything he or she seeks. However, it must be recognised that a successful review may have implications for an appeal and a successful appeal may have implications for a review and - to use the adjudication officer's words - a pragmatic approach is called for if there is to be reasonably speedy adjudication without there being inconsistency between decisions. If a decision under appeal is reviewed, the appeal may lapse - at least in part. If the appeal survives and is successful and the tribunal's decision is set aside, the review decision may fall with it. The extent to which an appeal affects a review and vice versa will, I think, depend on the legal basis of the review and the particular questions that have been determined in consequence of the review and so it will be necessary to consider this issue in the context of the particular circumstances of each case as it arises.

10. In the present case, the only ground of review accepted by the adjudication officer was a change of circumstances identified as a deterioration in the claimant's mobility which does not appear to have been attributed to any particular event. A decision given in consequence of such a review can only have effect from, at the earliest, the date of the change of circumstances, which must be after the date of the decision under review. Such a review decision may cause an appeal to lapse in respect of the period from the date of the change of circumstances, but it cannot affect the appeal insofar as it relates to any earlier period. Accordingly, I am satisfied that I have jurisdiction to hear this appeal against the decision of the tribunal given on 3 November 1993.

11. There then arises the question whether the review decision falls if I set aside the decision under review which is, in practical terms, the same as the question whether the appeal lapses in respect of the period covered by the review decision. Where a decision is reviewed on the ground of change of circumstances, it seems to me that in many cases the review decision falls when the decision under review is set aside, because it is difficult to say whether or not there has been a

change of circumstances once the findings of fact of the tribunal go. On the other hand, that is not always so. There may be cases where it is right that a review decision should stand, notwithstanding that the decision which has been reviewed has been set aside by a Commissioner. For instance, in a case where it was common ground that the claimant had become more seriously disabled following a stroke which had occurred since a tribunal's decision, it would follow that, whatever the result of an appeal against that decision and whatever new decision were given in its place if it were set aside, there had been a relevant change of circumstances following which the conditions of entitlement were satisfied whether or not they had been satisfied before the change of circumstances took place. In those circumstances, I would not regard it as necessary to direct that the review decision should fall, if I were to set aside the tribunal's decision. Instead, I would regard the scope of the appeal as having been narrowed so that the tribunal to whom I remitted the case would be obliged to consider only the period before that considered on the review.

12. However, in the circumstances of the present case, it seems to me that the review decisions - which have not resulted in any revision and which are currently the subject of an appeal - must be treated as falling with the decision of the tribunal I have set aside, and that the appeal adjourned on 5 July must be treated as having lapsed. All the issues that could have been considered in that appeal may more conveniently be considered in the appeal that I am now remitting. Accordingly, the tribunal to whom I now refer this case, must consider all issues arising up to the date of their decision.

13. I should add that I have considered whether section 32(1) of the Social Security Administration Act 1992, which is applied by virtue of section 35(12) to reviews under section 35, throws any light on this issue. I have decided that it does not. Section 32(1) provides that "[a]n award of ... a disability living allowance ... on a review ... replaces any award which was the subject of the review." The use of the word "award", rather than "decision", is significant. There cannot be an "award" unless it is determined that some benefit is payable and I do not think that it can be said that there is "an award ... on a review" unless the review results in a revision of an earlier decision awarding, or refusing to award, benefit. Section 32(1) therefore applies only where there was originally an award of benefit and a review results in a different award and it seems to me that the purpose of the provision is to ensure that there is no duplication of awards. In any event, there is nothing in that provision to suggest that "an award ... on a review" can survive the removal of the logical basis upon which the underlying review depended. It therefore does not have the effect that an appeal always lapses when there is a review of the decision under appeal or that, where there has been an award on a review, the review decision must always survive even if the decision under review is set aside.

14. It follows from what I have said above that I think that the

adjudication officers were right to deal with the claimant's applications for review of the tribunal's decision and further review, because there would have been an unwarranted delay had they refused to do so until this appeal against the tribunal's decision had been heard. However, I also think that the tribunal sitting on 5 July were right to adjourn the appeal against the further review decision in the light of the forthcoming hearing before me on 3 August. On the other hand, had the tribunal been satisfied that, on review, they could give the claimant everything he sought on the appeal to me and that the appeal to me would have been withdrawn to the extent that it did not lapse, they would have been entitled to determine the appeal before them. It seems to me that the decision whether or not to adjourn will always depend on the circumstances of each case and, in particular, the amount of delay which will result, the issues arising on the appeal and the review and the extent to which there is agreement between the parties.

15. I will now explain why I allow the appeal. The claimant submitted that the tribunal "did not have full knowledge" of his condition. In part he meant that they were not fully aware of his circumstances - and he referred to the fact that further reports had subsequently been obtained - and in part he meant that they did not understand the overall effects of his numerous disabilities and he complained that they did not look at him "in a collective fashion" and merely "analysed each section". An appeal to a Commissioner lies only on a point of law and I do not consider that the claimant has raised points of law. A tribunal can only decide a case on the evidence before them and the fact that further evidence might have been adduced does not render their decision erroneous in point of law. I accept the claimant's point that the tribunal were obliged to consider the total effect of his disabilities, but they were required to determine whether the resulting disablement was such that any of the conditions mentioned in sections 72(1) and 73(1) of the Social Security Contributions and Benefits Act 1992 were satisfied. The claimant was awarded the lowest rate of the care component because the tribunal found that one of the conditions mentioned in paragraph (a) of section 72(1) was satisfied but that none of the conditions mentioned in paragraphs (b) and (c) of that section or any of the conditions mentioned in section 73(1) were satisfied. The fact that they found that none of those other conditions was satisfied in this case does not mean that they did not consider the claimant to be severely disabled.

16. Mr Hewitt adopted the written submission dated 2 March 1995 of the adjudication officer originally concerned with this appeal. He submitted that the tribunal's decision was erroneous in point of law on the ground that the chairman had failed adequately to comply with the duty to record the tribunal's reasons for decision imposed by regulation 26E(5) of the Social Security (Adjudication) Regulations 1986. With some hesitation, I have concluded that that submission is well founded, although I must stress that the fact that I set aside the last tribunal's decision on that ground does not mean that the claimant will

necessarily be any more successful before the tribunal to whom I now refer the case.

17. The first respect in which it is said that the tribunal's reasoning was inadequate arises from the tribunal's consideration of section 72(1)(b)(ii) of the Social Security Contributions and Benefits Act 1992 (the day supervision condition). There was evidence, which the tribunal accepted, that the claimant suffered dizzy spells and there was also evidence that those dizzy spells led the claimant to fall over once or twice a month. The chairman did not record any finding as to whether the claimant did fall or as to the effect of any such falls. The claimant told me that he suffered from a form of epilepsy and that the reason he falls is that he does not always have warning of the attacks. When he does have warning, he can actually stop himself from falling. Where a person falls due to unpredictable attacks of some sort, there inevitably arises the question whether he requires continual supervision to avoid substantial danger to himself or others, although it is not inevitable that the answer to that question will be that he does. The tribunal merely said "there is no evidence that he requires continual supervision in order to avoid substantial danger to himself or others either by day or by night". That is not a sufficient explanation in a case like the present. The claimant is entitled to know whether it was accepted that he has falls and to know why any such falls are not considered to give rise to a need for supervision (R(A) 3/89 and R(A) 5/90). The fact that falls are relatively infrequent is not by itself a ground for holding that continual supervision is not required (Moran v. Secretary of State for Social Services reported as an Appendix to R(A) 1/88).

18. The second respect in which it is said that the reasoning is inadequate arises from the tribunal's consideration of the claimant's entitlement to the mobility component under section 73(1)(a) of the Social Security Contributions and Benefits Act 1992 and regulation 12(1)(a)(ii) of the Social Security (Disability Living Allowance) Regulations 1991. Regulation 12(1)(a) provides:-

"A person is to be taken to satisfy the conditions mentioned in section [73(1)(a)] of the Act (unable or virtually unable to walk) only in the following circumstances -

(a) his physical condition as a whole is such that, without having regard to circumstances peculiar to that person as to place of residence or as to place of, or nature of, employment -

(i) he is unable to walk; or

(ii) his ability to walk out of doors is so limited, as regards the distance over which or the speed at which or the length of time for which or the manner in which he can make progress on foot without severe discomfort, that he is

virtually unable to walk; or

- (iii) the exertion required to walk would constitute a danger to his life or would be likely to lead to a serious deterioration in his health;"

The chairman of the tribunal recorded the claimant's oral evidence on this issue in the following terms:-

"[The claimant] confirmed that he could walk up to 400 yards at his own pace, which was slower than normal, before he had to rest because he felt pressured pain. On occasions he used a walking stick with his left hand because he had had problems with his right shoulder and was awaiting an operation.

On occasions he feels drained and has to rest for between 20 minutes and two hours before he can continue."

Among the record of findings of fact, the chairman recorded:-

- " 1. [The claimant] accepts that he can walk 400 yards at his own pace without suffering severe discomfort and he does not need guidance or supervision from another person on unfamiliar routes."

The reasons for deciding that the claimant was not entitled to the mobility component of disability living allowance were recorded in the following terms:-

"From [the claimant's] own evidence the tribunal is satisfied that he is not unable or virtually unable to walk because he has stated specifically that he can walk up to 400 yards out of doors at his own pace without suffering severe discomfort, using a walking stick as necessary and at a speed less than normal.

There is no evidence to suggest that the exertion required to walk would constitute a danger to his life, nor would it cause a serious deterioration in his health."

19. Mr Hewitt submitted that the findings of fact did not necessarily flow from the evidence because the evidence did not exclude the possibility that the claimant suffered from severe discomfort while walking the 400 yards before he stopped. Semantically, that is correct but, if there was a misunderstanding of the import of the evidence, that seems to me to give rise to a mistake of fact rather than an error of law. The tribunal's finding was not inconsistent with the evidence even if another conclusion might have been drawn from the evidence.

20. I was also, at first, not entirely convinced by the adjudication officer's assertion that the tribunal had made inadequate findings in respect of the claimant's ability to walk. They had had regard to the distance the claimant could walk and

the speed at which he could walk and they also considered whether the walking could be achieved only with severe discomfort. In my view, their findings on those matters, though brief, are sufficient to show that they approached the case properly. The evidence did not suggest that there was anything relevant in relation to the manner in which the claimant walked.

21. However, Mr Hewitt argued that the tribunal ought to have made a finding as to the extent to which the claimant was prevented from walking further after he had walked 400 yards, which was a point the claimant had specifically mentioned in evidence. He submitted that that was relevant to the question of the length of time for which the claimant could walk, which is a relevant consideration under regulation 12(1)(a)(ii). I have come to the conclusion that he is right. A tribunal is entitled to conclude that a claimant is not virtually unable to walk if he can walk without severe discomfort for 400 yards at a reasonable, albeit slow, pace and, although obliged then to stop for, say, five minutes to recover, can afterwards walk without severe discomfort for a further 400 yards at the same pace. However, it would not be inconsistent were the same tribunal to conclude that a claimant was virtually unable to walk if, after walking the first 400 yards, he had to wait for two hours before being able to walk a further 400 yards. Regulation 12(1)(a)(ii) refers to distance, speed and length of time. As speed is a function of distance and time, it is to be presumed that the purpose of including all three factors is that consideration of the length of time for which a person is able to walk requires an adjudicating authority to take account of limitations as to time beyond the limits necessarily implied by the fact that it must take a certain length of time to walk the distance the claimant can manage at the speed he can manage. Accordingly, I accept that the tribunal's decision is erroneous in point of law because the chairman failed to record any finding on the claimant's assertion that there were periods when he was unable to walk at all after he had walked a moderate distance.

22. Because the tribunal's record of decision was inadequate, I must set aside the decision. A disability appeal tribunal is better qualified than a Commissioner to make findings of fact on the sorts of issues arising in this case and I therefore refer the case to another tribunal who, as I have said, must consider all issues arising up to the date of their decision.

(Signed) M Rowland
Commissioner

Date: 31 August 1995