WMW/HJD/T/CH **Commissioner's File:** CSDLA/40/94

SOCIAL SECURITY ADMINISTRATION ACT 1992

APPEAL TO THE COMMISSIONER FROM A DECISION OF A DISABILITY APPEAL TRIBUNAL UPON A QUESTION OF LAW

DECISION OF SOCIAL SECURITY COMMISSIONER

Name:

Disability Appeal Tribunal: Glasgow

Case No: D/51/131/93/1011

1. This claimant's appeal succeeds. I hold the appeal tribunal decision dated 3 November 1993 to be erroneous in point of law and accordingly set it aside. I refer the case to the tribunal for determination afresh in light of the guidance which follows.

2. In May 1992 the claimant sought a disability living allowance The claim form raised issues concerning only the mobility component. An adjudication officer determined that no award should be made but, on a review, another adjudication officer determined that the claimant was entitled to the lower rate of the mobility component. It was only against the review decision that a right of appal arose and the claimant exercised that right. The grounds of appeal make it fairly clear that she was seeking only an increase in the rate of the allowance - that is from the lower to the higher rate of the mobility component. The review decision seems to have been made in April 1993. The submission to the tribunal was prepared some three months later. It noted that the claimant had not sought any care needs. I observe that some of the intervening correspondence might have been otherwise interpreted but since nothing turns upon that in the event I say no more about it other than to remind the adjudication authorities of what I said upon the duties of adjudication officers in CSDLA/19/94.

3. When the case came before the tribunal it was clear that the claimant was seeking both the higher rate mobility component and also a care component. The tribunal refused to interfere with the then existing award and refused the appeal. They made a commendably full record of the evidence before them, their findings of fact and their reasons. The claimant sought and was refused leave by the chairman. Subsequently, and not least in the light of the decision by the House of Lords in Mallinson (ap) v Secretary of State for Social Security I granted leave. The adjudication officer now concerned supports the appeal in a submission which I have found to be of considerable assistance.

4. The claimant proponed three grounds of appeal. For the reasons fully set out by the adjudication officer now concerned, none of these is truly a point of law in criticism of the tribunal decision. I should therefore emphasise that I can only interfere with that decision if I am first satisfied that the tribunal applied incorrect law, applied correct law incorrectly, or failed to give any party's case a fair hearing and consideration. None of the grounds of appeal raises any issue within those parameters. Thus medical assessments, right or wrong and medical

records, up to or out of date, are matters beyond the control of the tribunal and so whether such criticisms are sound or not cannot detract from their decision. The tribunal are entitled to determine to reject evidence if they explain why they did so. This tribunal did that. Whether they were right or wrong, in an absolute sense, to do so is neither here nor there. One of the reasons of having cases determined by tribunals is so that, as a kind of jury, they can assess the soundness of the evidence put before them whether by a claimant or an adjudication officer. I have no jurisdiction to interfere with their views about the reliability of evidence. This tribunal, as the adjudication officer now concerned has carefully pointed out, provided such explanation as was requisite.

5. There is one matter, within the grounds of appeal, with which I should also specifically deal. That is the delay in responding to the claimant's request for leave of the chairman to appeal to the Commissioner. Once again that is not, strictly, an error of law on the part of the tribunal in their actual decision and so of itself does not assist the claimant in her appeal. Moreover, I have no jurisdiction over the administration of the tribunal being only concerned, as already indicated, with the legal soundness of their decision. Nonetheless, I note from the papers that the claimant sought leave to appeal in a letter dated 3 and received by the Tribunal Office on 11 November 1993. As it happened, the tribunal had sat on the former date although their decision was not signed until 30 November 1993 nor issued until 13 December 1993. No doubt part of that delay was due to chairman's careful and full setting out of the evidence, findings and reasons. The decision was intimated to parties on 13 December 1993. Whatever the reason, the letter of 3 November 1993 was not sent to the chairman for consideration until 4 July 1994. She dealt with it on 7 July and on 16 July the claimant was told that she had refused leave to appeal. I can well understand the claimant's concern. I regard it as reprehensible that an application for leave to appeal should remain without action for seven months. I am aware, unfortunately, that there have been a number of similar delays and whilst in other decisions I have equally commented thereupon, I have to repeat that I have no jurisdiction over the tribunal's administration. That is a matter which, if it is to be taken up further, will require to be taken up with that organisation.

6. Turning, now, to the real issues in the case before me, the adjudication officer has made two criticisms in law of the tribunal decision, both of which I accept. One of them stems from the House of Lords decision in Mallinson and, it having been issued after their decision was signed, that does not import any criticism of the tribunal.

7. The first point concerns the qualification for the lowest rate of the care component, namely the question of the claimant's ability, given the materials, to prepare a main meal for herself as prescribed in section 72(1)(a)(ii) of the Social Security Contributions and Benefits Act 1992. It is familiarly known as "the cooking test". The tribunal held that the claimant could prepare a cooked meal for herself. They made that a finding of fact. However, as the adjudication officer now concerned has pointed out the evidence before them was that the claimant was sufficiently without sight as to be registered blind. It was said, indeed, in the evidence that she had -

> ".. not cooked for 8 years because of the problems with her eyesight."

The passage continues -

> "she couldn't chop a vegetable or stand at a cooker."

The latter seems to be related to a condition of vertigo. The findings of fact go on to record that the claimant was on the blind register and was receiving treatment for her vertigo. There was evidence that the claimant also suffered from epilepsy. The tribunal, as they were entitled to do, found the evidence about that and in particular the epilepsy and her fits to be confusing and conflicting. However, in my judgment, they do not adequately explain why they rejected the evidence about vertigo nor have they explained why, if it was the case as it appears to have been, they held that that did not affect her ability to prepare a main meal. Had that been all to the matter I might have taken the view that such a criticism was venal. But then, when it comes to the question of the claimant's sight they comment, no doubt correctly, that although on the blind register the claimant -

".. is not blind but partially sighted."

They go on to explain why certain needs, in the way of selecting clothes, running a bath and the like are rejected by them as producing a requirement for attention, under the care needs provisions, and their explanation of that is sufficient in law. But when it comes to preparing a main meal the need for precise sight is obviously greater than selecting clothes, where touch may be used and running a bath, where the position of the taps may, as the tribunal pointed out, be memorised. Moreover the risk of danger is probably greater in a partially sighted person seeking to prepare a main meal than from attempting to run a bath. Of course all may depend upon the extent to which the sight is partial but it has to be borne in mind, as the tribunal found, that this claimant had been on the blind register, according to the evidence, since 1987. I do not think that the tribunal have, therefore, sufficiently explained why they made a finding of fact as boldly as -

"She can prepare a cooked meal for herself."

Indeed, strictly, the test has been erroneously applied because in terms of the legislation it is as to whether an individual can or cannot -

".. prepare a cooked main meal for herself if he has the ingredients .."

A "main meal" may well involve much more than just a "meal". In that respect there are such ancillary activities as those set out in paragraphs 10 and 11 of decision CDLA/85/94 - also issued after the tribunal's decision was signed. In this particular case I think it right to direct the new tribunal that if they have no less evidence and make no less positive findings of fact upon the matter than did the old tribunal then the probability is that the test will have been satisfied and so an award appropriate will require to be made.

8. So far as Mallinson is concerned, the new tribunal will require to determine whether this claimant, when walking in unfamiliar surroundings, requires some personal service of an active nature in the way of attention in connection with the bodily function of seeing. They will require to assess that and then determine whether such attention, when added to any other attention, amounts to "frequent attention throughout the day" so as to satisfy section 73(1)(b)(i) of the Contributions and Benefits Act in which case, of course, the claimant would be entitled to the middle rate of the care component.

9. The adjudication officer now concerned suggests that the tribunal have also erred in law by failing to explain why the discomfort the claimant suffers due to incontinence when walking

and which makes her uncomfortable does not count when considering whether or when she suffers from severe discomfort in terms of regulation 12(1)(a)(ii) of the Social Security (Disability Living Allowance) Regulations 1991. That provisions expands what is set out as the test for the higher rate of the mobility component in section 73 of the Contributions and Benefits Act. She submits, nonetheless, that even had the tribunal done that it would not have assisted the claimant because R(M) 1/83 is authority for the view that it must be physical pain that is involved rather than discomfort resulting from having to walk in wet clothing. Having considered the matter, I do not find paragraph 26 of the decision cited to be authority for that proposition. What was therein stated was this -

> "In our view .. the words "severe discomfort" relate to matters like pain and breathlessness that may be brought on by walking. In decision CM/1/81 (not reported) the Commissioner expressed the view that regulation 3(1)(b) [the predecessor to regulation 12] confined the description of "virtually unable to walk" to conditions in which walking caused severe discomfort. He subsequently rejected this opinion (see decision R(M) 1/81 at paragraph 13). While we consider that he was right to retract the opinion, we nevertheless agree with the view [that "severe discomfort" does not extend to the screaming attack of an autistic child or a refusal to walk of a child suffering from Down's Syndrome]."

That passage, as a whole, persuades me rather that if the action of walking brings on a condition connected with the walking and which can be described as "severe discomfort" the regulation will be satisfied. Thus the action of walking may bring on discomfort in a knee because of the effects of arthritis. That discomfort would undoubtedly count. It seems to me to be much the same thing if the action of walking triggers a release of urine which in turn causes, in an obvious way, discomfort. Much may then depend, therefore, upon just how close is the triggering relationship between the walking and the incontinence. That will be a matter for the new tribunal to consider and determine and it may be that the claimant would be well advised to consider whether there is any medical or other evidence that she can bring to bear to assist them in that matter.

(signed) W M Walker
Commissioner
Date: 5 April 1995