THE SOCIAL SECURITY COMMISSIONERS

Commissioner's Case No: CS/3866/99

SOCIAL SECURITY ADMINISTRATION ACT 1992

SOCIAL SECURITY CONTRIBUTIONS AND BENEFITS ACT 1992

SOCIAL SECURITY ACT 1998

APPEAL FROM DECISION OF A SOCIAL SECURITY APPEAL TRIBUNAL ON A QUESTION OF LAW

Commissioner: C Fellner

Claimant	:	Jeannie HUGHES-EDWARDS
Tribunal	:	Cambridge
Tribunal Case No	:	S/42/140/1998/00522
Hearing date	:	15 July 1998

1. This appeal, brought with leave of a tribunal chairman, fails. The decision of the Social Security Appeal Tribunal on 15 7 98 was not erroneous in point of law, as explained below. I held an oral hearing at which the appellant was represented by Mr Stewart Wright of the Child Poverty Action Group and the Secretary of State by Miss A Powick. I am most grateful to both of them for their clear submissions, and even more so for their agreement that despite the detailed written submissions that had been made on the point, the *vires* of the regulations under consideration in this appeal are no longer in dispute. Miss Powick accepted for the purposes of this appeal that the *vires* for certain amendments to the Social Security (Severe Disablement Allowance) Regulations are to be found in s68(11)(cc) of the Social Security Contributions and Benefits Act 1992. Mr Wright further accepted that no argument on vested rights under the Interpretation Act 1978 could be mounted, in view of the clear intention of Parliament in enacting certain amendments made in 1997. Both representatives were united in inviting me simply to interpret the word "establishing" in s68(11)(cc) - though to different effects. This is what I have done.

Legislative background

2. The appeal concerned severe disablement allowance (SDA), now provided for under s68 of the Contributions and Benefits Act. Under s68(3) (and subject to various other qualifying conditions, all of which the present appellant satisfied) a person is entitled to SDA where

> (a) on the relevant day [s]he is both incapable of work and disabled; and
> (b) [s]he has been both incapable of work and disabled for a period of not less than 196 consecutive days ending immediately before the relevant day.

3. The usual method of assessing disablement was by means of an examination by an adjudicating medical authority (AMA), subject to appeal to what used to be a medical appeal tribunal. Under ss(6), a person was disabled for the purposes of s68 if [s]he suffered from loss of physical or mental faculty such that the extent of the resulting disablement assessed in accordance with Schedule 6 to the 1992 Act amounted to not less than 80%.

However, with effect from 13 4 95, s9 of and Schedule 1 paragraphs 11(5) and 18 to, the Social Security (Incapacity for Work) Act 1994 inserted into s68(11), *inter alia,* ss(cc), which provided that regulations might

> prescribe evidence which is to be treated as establishing that a person suffers from loss of physical or mental faculty such that the extent of the resulting disablement amounts to not less than 80%.

Regulation 10(1)(b)(i) of the Social Security (Severe Disablement Allowance) Regulations already provided for the purposes of s36(5) of the Social Security Act 1975 (the forerunner of s68) that entitlement to the higher rate mobility component of disability living allowance (DLA) might constitute evidence providing a deeming of 80% disablement on any day. The *vires* for this provision were not free from obscurity, but happily I need not concern myself with this. I should stress that entitlement to higher rate mobility component did not and does not of itself entail actual 80% disablement. DLA is not assessed by reference to any particular degree of disablement but on quite different criteria. The deeming provided by regulation 10(1)(b)(i) was popularly known as "passporting", and saved a claimant from the need for (and perhaps the DSS from the expense of) the usual SDA assessment by reference to degree of disablement.

4. However, with effect from 1 4 97 regulation 3 of the Social Security (Incapacity for Work and Severe Disablement Allowance) Amendment Regulations 1997 (SI 1997 No 1009) removed entitlement to the higher rate mobility component of DLA from the evidence which could provide a deeming of 80% disablement. The only passporting available from that date under regulation 10(1)(b) was from an award of the highest rate care component of DLA. Regulation 4(a) of SI 1997 No 1009 provided a saving for a person who before the coming into effect of the regulation was *entitled* (my italics) to SDA by virtue of having satisfied (*inter alia*) regulation 10(1)(b) of the unamended Severe Disablement Allowance Regulations.

Factual background to this appeal

5. The appellant suffers from ME, and was accepted as incapable of work from 14 3 96, a date 196 days before 11 9 96. This has never been in dispute, and consequently she at all material times satisfied the incapacity for work requirement in s68(3) of the 1992 Act. However, when she was

assessed for SDA by an AMA, she received a disablement assessment of only 3%, a long way short of the 80% necessary for the usual route of qualification under s68(6). I understand that she appealed this assessment; her representative did not know the result, but reasonably concluded that since he was still instructed to argue passporting at the oral hearing, she had not succeeded on that appeal. The 196-day qualifying period for the incapacity condition, which expired on 10 9 96, was therefore of no help to the appellant on the disablement condition, as she did not at any time during that period satisfy the 80% disablement requirement.

6. However, she was awarded the higher rate mobility component of DLA for 3 years from 4 12 96, and therefore by a fresh SDA claim made on 13 1 97 she sought to take advantage of the passporting then still provided by the old form of regulation 10(1)(b) of the Severe Disablement Allowance Regulations. But the 1 4 97 amendment removed higher rate mobility component as a passporting benefit when she had only partly served the 196-day qualifying period. Her SDA claim was rejected on this ground, and the tribunal upheld that rejection.

The appeal to me

7. Mr Wright accepted that any relevant 196-day qualifying period could run only from 13 1 97, the date of the fresh claim, and not from 4 12 96, the date from which the DLA award began. He pointed out as background, quite correctly, that to qualify for DLA at 4 12 96 the appellant would have to have been accepted as having satisfied the qualifying conditions continuously for 3 months, and as being likely to continue to satisfy them for a further 6 months, a continuous period of 9 months. But on a regular SDA assessment under s68(6) she would only have needed to show disablement on one day (the day of examination), and provided there was no change of circumstances for the 196-day qualifying period she would thereafter (in the absence of a time-limited award or a review) have continued to qualify without further examination. He therefore suggested that the DLA conditions were in fact more demanding than the SDA conditions.

8. Mr Wright's argument was quite simply that having proved, by production of evidence of her DLA higher rate mobility award (which she had done by form SDA12 dated 10 3 97, at pages 4-4B), that she could be passported as disabled on one day of the necessary 196 days from 13 1 97,

the appellant had satisfied the disablement conditon for SDA before the regulations were amended on 1 4 97, and the amendment therefore, in the absence of any evidence of change of circumstances, made no difference to her established disablement. He did not, as I explained above, argue this on the basis of any acquired right under the Interpretation Act 1978, but on the wording of s68(11)(cc), which empowers the prescribing of evidence which is to be treated as *establishing* that a person is 80% disabled. He pointed to the *New Shorter Oxford English Dictionary* definitions of "establish", such as "institute or ordain permanently by enactment or agreement; secure or settle (property etc) on or upon a person; set up on a permanent or secure basis;...place beyond dispute". These definitions all imported a degree of permanence, of once-and-for-all settlement, which supported the argument that if DLA entitlement were once demonstrated, the resulting entitlement to SDA could not thereafter be lost as a result of an amendment to the passporting regulations.

9. I asked Mr Wright what the position would be if an SDA adjudication officer were presented with a DLA award certificate showing that an award undoubtedly subsisting at the date of presentation would terminate before the expiry of the SDA 196-day qualifying period. Would this nonetheless be sufficient to "establish" disablement for SDA purposes? Mr Wright felt unable (subject to any possible renewal) to argue that it would; and indeed in paragraph 26 of his written submission he had indicated that if the appellant's DLA entitlement had been removed she would also have lost SDA entitlement.

10. I also asked him what was the purpose of the 196-day SDA qualifying period, if his argument were correct. Would it not be enough, in accordance with his argument, if entitlement were shown on one day? He submitted (rather faintly, I thought) that the 196-day period referred to the other condition of incapacity for work, and that in any event it had been put there by Parliament to ensure that some degree of permanent disablement should be required, though the actual period was quite arbitrary.

11. I further asked Mr Wright why use of the word "establishing" should necessarily be taken to mean that establishment on one day only, rather than from day to day, should suffice. He submitted, rather more strongly, that regulation 10(1)(b), in both the old and new forms, referred (as it did and does) to evidence that "on any day" a person was 80% disabled by evidence

that "on that day" [s]he was entitled to a certain level of DLA. This suggested strongly that only one day, rather than a succession of days, need be looked at.

12. As to the saving provision in regulation 4(a) of SI 1997 No 1009, which on the face of it protects only those who had already qualified for ("is entitled to") SDA as at 1 4 97 under the old form of regulation 10(1)(b), Mr Wright argued that this formulation was attributable to the draftsperson's caution. S/he had believed that entitlement would not otherwise have been established without continuous fulfilment of the disablement condition during the 196-day period; but this was a mistake, and the saving provision was unnecessary.

13. Miss Powick submitted that it was wrong to look at s68(11)(cc) in isolation, without regard to the structure of s68 as a whole. The requirement of s68(3) was that both the incapacity and the disablement conditions should be fulfilled for each and every day of the 196 days, not merely for one. Even though a regular SDA assessment (in accordance with Schedule 6 to the 1992 Act) was made on only one day, it had to have effect for a forward period, or the condition would not be satisfied.

14. I asked Miss Powick whether the wording of regulation 10, referring to "on any day" did not have some flavour of singularity about it. She submitted that it merely allowed a claimant to produce a DLA award on a particular day for the purposes of evidence; the claimant would not, as a matter of her own and administrative convenience, need to keep on producing it, but she would need to be able to continue doing so if required. All that s68(11)(cc) does is empower the prescription of evidence which may be accepted as an alternative to a regular SDA assessment. It does not override the operation of s68(3), which lays down the two conditions of entitlement to SDA. The appellant was simply unfortunate in that the running of her qualifying period was aborted by the 1 4 97 amendment to regulation 10, which meant that her higher rate mobility award no longer allowed her to be treated as satisfying the disablement condition.

15. The word "establish", Miss Powick submitted, did not indicate the degree of permanence contended for by Mr Wright. A further definition from the same dictionary is (as argued by the Secretary of State's officer lately concerned with this appeal) "ascertain, demonstrate, prove". This was

readily applicable to something that had to be ascertained etc from day to day, not one-off.

16. Mr Wright responded that the appellant's DLA award, being for 3 years from 4 12 96, in any event extended beyond her 196-day qualifying period which ended in June 1997. But at the end of the day, he said, it was for me to interpret the legislative provisions, in particular the word "establishing" in s68(11)(cc), as I considered appropriate.

My decision

17. I have not found this an entirely straightforward point. The use of the word "establishing", with the preponderance of its dictionary definitions having the flavour of some degree of permanence, coupled with the reference in regulation 10 to "on any day", is perhaps capable of suggesting a one-off test of disablement, rather than one that continues from day to day throughout the qualifying period. But I am not entirely happy at the concession that s68(11)(cc) was providing the *vires* for the pre-1997 form of regulation 10, though it clearly does so for the 1997 amendments. And even on the concatenation of language most favourable to the appellant, I am not persuaded that I am bound to read the provisions as setting up a once-and-for-all test of disablement. As Miss Powick argued, the conditions of entitlement in s68(3) on the face of them require a 196-day qualifying period for both the incapacity and the disablement conditions, and Mr Wright offered me no convincing reason to distinguish between them. The subsection, indeed, refers to 196 "consecutive" days, which militates against a test satisfied only on one day. All tests based on actual assessment (whether the All Work Test for incapacity or the regular SDA test) take place on one particular day but are treated as applying for forward periods, unless grounds for review or supersession are established. It would be impossible for the system to operate otherwise. Mr Wright conceded that a DLA award which on the face of it would terminate before the end of the 196-day qualifying period would not, in the absence of renewal which would have to be tested at a later date, be conclusive.

18. "Establish" is capable, according to the *New Shorter Oxford English Dictionary,* of suggesting a degree of permanence; but as I understand it even the Church of England, mentioned in the entry as an example of an established institution, may be disestablished if Parliament so wills. In the

present case, Parliament used the regulation-making power conferred by s68(11)(cc) to will the 1997 amendment to regulation 10 removing an award of higher rate mobility component as a passport to SDA. It is, rightly in my view, no longer argued that this was outside that power, nor that an Interpretation Act point arose. Regulation 4(a) of SI 1997 No 1009 was, also in my view, intended only to protect those who had already become entitled to SDA on the basis of having completed a 196-day qualifying period with the benefit of an award of higher rate mobility component by 1 4 97. This probably was unnecessary, as the right would already have been established; but I do not feel obliged on that ground to read its protection as extending to someone in the appellant's position who simply had not completed the s66(3) qualifying period by the date of the amendment.

19. The appeal therefore fails. The legislative concession contained in the old version of regulation 10, which treated a claimant who may well not have been 80% disabled as nonetheless disabled to that extent, was withdrawn before the appellant was able to finish taking advantage of it. She no doubt feels aggrieved at this, but I am unable to help her.

(signed) Christine Fellner
Commissioner

16 October 2000