

D'S/A11

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SOCIAL SECURITY ADMINISTRATION ACT 1992

SOCIAL SECURITY CONTRIBUTIONS AND BENEFITS ACT 1992

APPEAL FROM DECISION OF DISABILITY APPEAL TRIBUNAL ON A QUESTION OF LAW

DECISION OF THE SOCIAL SECURITY COMMISSIONER

4 CSDLA/121/94

1. My decision is that the decision of the disability appeal tribunal (DAT) given on 26 November 1993 is erroneous in law and accordingly I set it aside. The claimant's case is referred to another DAT for reconsideration.

2. This is the claimant's appeal against the decision of the DAT of 26 November 1993, leave having been granted by me.

3. On 15 December 1992 the claimant claimed disability living allowance. The claim was rejected. The claimant applied for review. Medical reports from Dr Treharne, the claimant's own doctor, and Dr Branford, a consultant dermatologist dated June 1993 and 9 June 1993 respectively were submitted in support of the claimant's claim. There was a review. However the decision was not revised. The claimant appealed to the DAT.

4. The claimant and his representative attended the hearing of the appeal before the DAT on 26 November 1993. In the event the DAT dismissed the appeal. The findings of fact read:-

V "[The claimant] is a 30 year old man. He lives with his partner. He suffers with Erythropoietic Protoporphyrria, a skin condition which means any exposure to light may produce inflammation of the skin with subsequent scarring. He has also suffered an injury at work to his left knee which now contain some loose bodies. This causes him some pain and discomfort on walking.

[The claimant's] skin condition is such that he may suffer inflammation of the skin 4 times in a 4 week period which would require his carer providing intensive nursing for a

short period of time.

His condition, whilst being extremely unpleasant and periodically very disabling, is in the main well controlled by the application of barrier creams. He is also aware of his problem and takes the precautions recommended by his medical advisers to control the situation. He does not apply his barrier cream every day. When he does apply it it may take $\frac{1}{2}$ an hour and during the course of this he may need some assistance from his carer. The position regarding his skin complaint is well documented in the letter of 9 June 1993 from Dr Branford and the letter of 1 June 1993 from his GP Dr Treheane.

He is awaiting further investigation in respect of his left knee from an Orthopaedic Surgeon next week."

The reasons for decision reads as follows:-

"As can be seen from our findings of fact, whilst we accept that [the claimant] has a most distressing skin condition, we cannot see that it gives rise to the level of attention in connection with his physical functions or a requirement for supervision which would warrant an award of the care component.

We cannot see that the skin condition interferes with his physical ability to progress on foot. Whilst we accept it does give rise to some difficulties in proceeding out of doors nevertheless, on most occasions with adequate precautions, [the claimant] is able to move around out of doors without great difficulty so far as the skin condition is concerned.

With regard to his knee, we accept that there is some pain and discomfort arising from the knee. It does not however render him unable to walk nor, in our judgment, does it render him virtually unable to walk. We have considered his ability to make progress on foot over even ground and have had regard to the speed and manner of his walking and whether or not there is any severe measure of discomfort involved. Whilst there is some pain and discomfort, we cannot find it to be of a severity to warrant an award in accordance with the Regulations.

We have considered R(M)1/78 where the Commissioner took the view that virtually unable to walk means "unable to walk to any appreciable extent or practically unable to walk". In our judgment [the claimant] cannot be held to be "unable to walk to any appreciable extent". ..."

5. The issue before the DAT was whether the claimant satisfied the conditions of entitlement for an award of the care component and/or ~~mobility~~ component of disability living allowance as provided by sections 72 and 73 of the Social Security Contributions and Benefits Act 1992 ("the Act"). The DAT had

before them evidence that the claimant suffered from attacks of inflammation of the skin once a month and that it took him up to two weeks to recover. The chairman's note of evidence records that the claimant stated "a reasonable pattern throughout the year ie four or five bad does in a 4 week period". The claimant criticizes the decision of the DAT on the ground that they failed to take into account that this meant "4 times of 5 days duration in a 4 Wk period". The DAT found as fact that after such an attack the claimant needed "intensive nursing for a short period of time" but I agree that they failed to take into account the reality of the position which was that out of 28 days the claimant required nursing for approximately 20 days. The decision was inadequate and failed to comply with the requirements of regulation 26E(5)(b) of the Social Security (Adjudication) Regulations 1986 and was erroneous in law in consequence.

6. The DAT that rehears this case should have regard to all issues arising under section 72(1) of the Act. With regard to the daytime conditions they should first have regard to section 72(1)(b). To satisfy the condition under paragraph (b)(i) the claimant has to show that he is so severely disabled that he requires from another person frequent attention throughout the day in connection with his bodily functions. The meaning of "bodily functions" and "frequent" is set out in appendix to R(A)2/80. "Requires" means "reasonably requires" and not "medically requires".

7. In the House of Lords judgment in Mallinson given on 1 April 1993 Lord Justice Woolfe considered section 35(1)(a)(i) of the Social Security Act 1975 [now section 72(1)(b)(i) of the Act] and held that:-

".. this .. involves doing no more than looking .. at the claimant's account of what he can and cannot do together with the relevant medical report and asking 4 simple questions: (1) Has the claimant a serious disability? (2) If so, what bodily functions does it impair? (3) Does he reasonably require attention in connection with those functions? (4) Is that attention frequent?"

Lord Justice Woolfe made it clear that different incidents of attention could be aggregated when considering whether the attention was frequent within the meaning of section 25(1)(a)(i). He held:-

"Attention during the incidents can then be aggregated with other incidents when attention is given and in the result they may be "frequent attention"."

8. In decision CA/124/93 the Commissioner considered the effect of the House of Lords judgment in Mallinson. He held that extra domestic laundry generated by the disability of a claimant did not amount to "attention in connection with bodily functions". However, he took the view that the services of another person to assist in removing and handling soiled clothes or other personal

attention could be taken into account in determining whether the conditions of entitlement were satisfied.

9. The DAT that rehears this case should assess the claimant's needs during the day having regard to the Mallinson judgment. The claimant's condition and needs were variable. The new DAT should record findings on the pattern of the claimant's good and bad days and consider the claimant's condition as a whole in assessing whether or not he satisfies the conditions of entitlement.

10. It does not appear to be contended that the claimant satisfied the daytime "supervision" condition contained in paragraph (b)(ii). However the DAT should confirm that this is in fact the position. If it is contended, the new DAT should have before the judgment of the Court of Appeal in Moran v Secretary of State for Social Services (appendix to R(A)1/88) where guidance was given with regard to the law which has to be applied in a case of this nature.

11. If the new DAT concludes that the claimant does not satisfy any of the conditions contained in section 72(1)(b) of the Act, they should proceed to consider the conditions contained in section 72(1)(a). With regard to paragraph (a)(i) the new DAT should have before them decision CDLA/58/93 which gives guidance on the interpretation of "a significant portion of the day". With regard to paragraph (a)(ii) they should have before them decision CDLA/85/94 in which I gave guidance on the interpretation of "cannot prepare a cooked main meal for himself".

12. In his claim pack the claimant identified his nighttime needs. The new DAT will have to decide on the evidence before them whether he satisfied any of the conditions of entitlement contained in section 72(1)(c) of the Act.

* { 13. With regard to the mobility component, the claimant contended he was virtually unable to walk in terms of section 73(1)(a) of the Act. Regulation 12(1)(a)(ii) of the Social Security (Disability Living Allowance) Regulations 1991 sets out the circumstances in which a person may be found to be virtually unable to walk for the purposes of section 73(1)(a). That regulation clearly imports that a person suffering from a physical disablement may be found to be virtually incapable of walking if his ability to walk out of doors is limited in one or more of the ways mentioned in that regulation in making progress on foot without severe discomfort. The effect of pain and discomfort on the claimant's walking ability was specifically in issue in this case.

14. The adjudication officer now concerned supports the appeal on the ground that the decision was inadequate because having found as fact that the claimant's knee "causes him some pain and discomfort on walking" they failed to explain why it did not amount to severe discomfort. I reject that submission. The DAT clearly related the claimant's limitations as to his walking

ability to the statutory provisions of severe discomfort. The DAT did not err on this ground.

15. The new DAT should consider afresh all issues arising under sections 72 and 73 of the Act. They should ensure that their decision complies with the requirements of regulation 29(5)(b) of the Adjudication Regulations 1995.

16. The claimant's appeal is allowed.

(Signed) R F M Heggs
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(Date) 10 May 1996

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