Dullcton 165 [Dhunt]

CDLA/1685/2004

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. The claimant's appeal against the decision of the Wakefield appeal tribunal dated 27 January 2004 is allowed. I set aside the tribunal's decision and give the decision that it should have given, which is that it did not have jurisdiction to consider the case before it.

REASONS

2. The claimant suffers from osteoarthritis, giving rise to severe pain in his lower back. Following a claim for disability living allowance and a report by an examining medical practitioner, he was awarded the higher rate of the mobility component and the highest rate of the care component of disability living allowance from 5 June 1995 for life. In August 2002, the Secretary of State obtained an up-to-date factual report from the claimant's general practitioner. That report raised questions about the claimant's entitlement to disability living allowance and the Secretary of State obtained another report, dated 3 December 2002, from an examining medical practitioner. In the light of that report, the Secretary of State superseded the award of benefit and decided that the claimant was not entitled to the mobility component of disability living allowance and was entitled for an indefinite period only to the lowest rate of the care component. The claimant appealed.

3. On 27 June 2003, the Wakefield appeal tribunal allowed the appeal and reinstated the original award. The claimant had not been present at the hearing but he had been represented. The Secretary of State, who had not been represented at the hearing, applied for a statement of reasons. The request was dated 23 July 2003 but was sent by fax on the following morning. It appears that the Secretary of State chased up the request and was then told on 21 August 2003 that there was no trace of it. He then made a further request. It was treated as a late request but time was extended to validate it. However, on 15 September 2003, the chairman of the tribunal wrote to the regional office of the Appeals Service pointing out that only two pages of his record of proceedings had been sent to him and that it was incomplete. In particular, his note of the tribunal's reasoning had been lost. He said –

> "I feel that I am in some difficulty in preparing the statement but would be grateful for advice before proceeding further.
>
> "Could this letter be placed before a District Chairman to consider and advise."

It appears that that letter was faxed and that the District Chairman did speak to the tribunal chairman because, on the same day, the District Chairman told the clerk that the tribunal chairman was unable to provide a statement and he instructed her to notify the Secretary of State and to invite the Secretary of State to apply for the tribunal's decision to be set aside.

4. On 2 October 2003, the Secretary of State responded with an application for leave to appeal to a Commissioner on the ground that the tribunal chairman's inability to produce a statement of reasons rendered the tribunal's decision erroneous in point of law. This required someone to override the Appeals Service's computer system, which appears not to approve of applications for leave to appeal being made before statements for reasons have been issued. On 7 October 2003, a different District Chairman drafted a decision setting aside the

tribunal's decision under regulation 57 of the Social Security and Child Support (Decisions and Appeals) Regulations 1999 (SI 1999 No 991) on the ground that the request for a statement of reasons had not been received by the tribunal chairman at an appropriate time. However, he said that, before the decision was made, the appellant was to be given the opportunity to make representations, as required by regulation 57(4). He also spoke to a representative of the Secretary of State who appears at first to have wanted to consider his position. On 15 October 2003, the District Chairman again spoke to a representative of the Secretary of State who said that he wished the decision of the tribunal to be set aside under section 13(2) of the Social Security Act 1998, rather than regulation 57, on the ground that the tribunal's decision was erroneous in point of law due to the inability to produce a statement of reasons. The District Chairman stated in his record of the conversation that he agreed with the Secretary of State's representative. He duly set aside the tribunal's decision under section 13(2). The decision is not dated but there is no evidence that the claimant was given any opportunity of commenting and I presume the decision was made immediately, on 15 October 2003, because the case was listed for rehearing on 27 November 2003. However, the hearing was adjourned to 27 January 2004 and took place at the claimant's home. The tribunal dismissed the claimant's appeal. He now appeals against the tribunal's decision with my leave.

5. An appeal to a Commissioner lies only on a point of law. The claimant has, understandably, not raised any point of law in his grounds of appeal, which merely amount to expressions of disagreement with the tribunal's findings of fact and expressions of grievance at the decision of 27 June 2003 in his favour having been set aside. The Secretary of State opposes the claimant's appeal.

6. When I granted leave to appeal, I raised the question whether the decision of 27 June 2003 had been validly set aside. I pointed out that, in the absence of a statement of reasons, a chairman would have had no power to consider the application for leave to appeal (although a Commissioner could have done so) and suggested that it was arguable that, in those circumstances, there was no power to set the tribunal's decision aside under section 13 of the Social Security Act 1998. I also invited the Secretary of State to comment on the propriety of the District Chairman having spoken to a representative of the Secretary of State but not having obtained any representations from the claimant before setting aside the decision. I will deal with this latter point first.

7. I agree with the Secretary of State that it was "not desirable" for the District Chairman to make contact with a representative of the Secretary of State in the way he did. The Secretary of State says, however, that the District Chairman was quite open and that therefore there was no impropriety. I have no doubt at all that the District Chairman was acting in good faith, trying to find the most appropriate way of dealing with an unusual difficulty. However, although he recorded in the tribunal file what he was doing, the claimant only became aware of that when the documents were revealed on this appeal. It is apt to give an appearance of bias if a chairman contacts one of the parties without at least informing the other. In the present case, it would have been better had the District Chairman's instructions of 15 September 2003 been copied to both parties, rather than just to the Secretary of State, and had the responses of both parties to the proposed decision of 7 October 2003 been obtained in writing.

8. As to the claimant being given an opportunity to make representations before the tribunal's decision was set aside, the Secretary of State submits that, in fact, the District Chairman wrongly set the tribunal's decision aside under regulation 57 of the 1999 Regulations on 7 October 2003 and that there is no evidence that the claimant was not allowed to make representations under regulation 57(4). However, the Secretary of State's representative overlooks the provisional nature of the decision on 7 October 2003 and I have no doubt that the tribunal's decision was actually set aside on a later date under section 13(2) of the 1998 Act, which the Secretary of State submits was the more appropriate provision. Furthermore, as I have already suggested, the dates and the lack of any evidence of the claimant being given an opportunity to make submissions satisfy me that he was not given such an opportunity in relation to the decision under section 13(2) and if he was given any opportunity as regards the proposed decision under regulation 57 it was curtailed when the District Chairman decided that a setting aside under section 13(2) was more appropriate.

9. There is nothing wrong in refusing an application for leave to appeal without obtaining the other party's comments because such a refusal does not adversely affect the other party's rights. Nor is there anything wrong in granting leave to appeal without obtaining the other party's comments because a grant of leave to appeal is not a final decision as to entitlement to benefit and, if an appeal is brought, the Commissioner will obtain comments. There is also nothing wrong in setting aside a decision under section 13(2) without giving the Secretary of State the opportunity to make a submission where the claimant has applied for leave to appeal, but that is only because the Secretary of State has waived his right to be given such an opportunity. Where the Secretary of State has applied for leave to appeal, it is plainly a breach of the rules of natural justice to set aside a decision under regulation 13(2) without giving the claimant an opportunity of commenting on whether the decision is erroneous in point of law.

10. I accept that in the present case it is unlikely that the claimant would have been able to persuade the District Chairman that the lack of a statement of reasons did not render the decision of 27 June 2003 erroneous in point of law. Nonetheless, the opportunity to make representations should have been given for two reasons. First, there is the general point that it is a matter of common experience that a case that appears at first to be open-and-shut may not appear so after representations have been received. That is the point of obtaining representations. The claimant might have advanced the argument that I raised when giving leave to appeal and will consider below; i.e., that the chairman had no jurisdiction to set aside a decision under regulation 13(2) in the absence of a statement of reasons. Secondly, had the claimant been made aware of the Secretary of State's request for a statement of reasons and the tribunal chairman's apparent inability to provide one, it was not inconceivable that he would have been able to persuade the tribunal chairman to provide a statement of reasons by reminding him of reasons he might have given orally when announcing the tribunal's decision.

11. However, nothing turns on the above observations because procedural defects in the setting aside of the decision of 27 June 2003 have no bearing on the present appeal if the District Chairman had jurisdiction to set aside that decision. The more important question is whether the District Chairman did have such jurisdiction. If he did not, the sitting aside was invalid, the decision of 27 June 2003 stands and the tribunal sitting on 27 January 2004 had no jurisdiction to adjudicate upon the claimant's entitlement to benefit. See, generally, R(I) 7/94.

12. Insofar as is material, the 1998 Act provides –

"**13.**- (1) This section applies where an application is made to a person under section 14(10)(a) below for leave to appeal from a decision of an appeal tribunal.

(2) If the person considers that the decision was erroneous in point of law, he may set aside the decision and refer the case either for redetermination by the tribunal or for determination by a differently constituted tribunal.

...

14- (1) Subject to the provisions of this section, an appeal lies to a Commissioner from any decision of an appeal tribunal under section 12 or 13 above on the ground that the decision of the tribunal was erroneous in point of law.

...

(10) No appeal lies under this section without the leave –
(a) of the person who constituted, or was the chairman of, the tribunal when the decision was given or, in a prescribed case, the leave of such other person as may be prescribed; or
(b) subject to and in accordance with regulations, of a Commissioner.

(11) Regulations may make provision as to the manner in which, and the time within which, appeals are to be brought and applications made for leave to appeal.

..."

13. I agree with the Secretary of State that the reason that a chairman cannot consider an application for leave to appeal in the absence of a statement of reasons for the tribunal's decision lies in regulation 58 of the 1999 Regulations, which provides that the time for applying to a chairman begins to run only when a statement of reasons is issued (see R(IS) 11/99 and CSDLA/536/99). I also accept his submission that there is no express provision in the primary legislation having the effect that a decision cannot be set aside under section 13 due to the effect of subordinate legislation made under section 14.

14. However, in my judgment, it is implicit in section 13(1) that the section applies only where the application made under section 14(10)(a) is one that the chairman has power to consider. Section 14(11) permits the imposition of a time limit for making an application for leave to appeal under section 14(10)(a). Regulation 58(1) of the 1999 Regulations imposes a time limit of one month from the date the applicant was sent the statement of reasons for the tribunal's decision and, although a late application may be accepted under regulation 58(5), it cannot be accepted if it is more than a year late. It seems to me to be quite inconceivable that it was intended that a chairman should be entitled to set aside a decision under section 13 when the application for leave to appeal was made over a year late. The same result must obtain where an application is not made within the prescribed time because no statement of reasons has been obtained and therefore time has not started to run.

15. I accept the Secretary of State's submission that section 13 "was introduced in order to provide a relatively straightforward, quick and inexpensive solution to correcting clear errors of law made by the tribunal, without having to take the longer and more expensive route where the case is dealt with by a Commissioner with exactly the same outcome" but it is entirely consistent with that view that the power conferred by section 13(2) should be available to be used only where a chairman would otherwise grant leave to appeal. There is considerable force in the Secretary of State's submission that the decision of 27 June 2003 was so obviously erroneous in point of law due to the failure to provide a statement of reasons that it is absurd that it should have been necessary to bring an appeal to a Commissioner. However, any absurdity is due to the manner in which regulation 58 of the 1999 Regulations is drafted, which has the effect of preventing a chairman from granting leave to appeal even though an error of law can be demonstrated without there being a statement of reasons for the tribunal's decision. If the drafting is intentional – as appears to be the case because R(IS) 11/99 was decided before the regulations were made – and it really is considered inappropriate for a chairman to grant leave to appeal in any case where there is no statement of reasons, it must be at least as inappropriate for him to take the more drastic step of setting aside the tribunal's decision himself.

16. There are other remedies. First, there are cases where a chairman could set aside the tribunal's decision under regulation 57(1)(a) of the 1999 Regulations, as the District Chairman was intending to do in this case before being dissuaded by the Secretary of State. Regulation 57(1)(a) permits the setting aside of a decision on the ground that "a document relating to the proceedings in which the decision was made … was not received at an appropriate time by the person who made the decision". The Secretary of State submits that it is concerned only with documents that should have been received before the hearing. I dare say that that is what the draftsman of the forerunners of the provision had in mind because the provision is undoubtedly concerned with documents that could have affected the outcome of the hearing and, until 1996, a hearing resulted in a full decision that included the tribunal's reasons. However, given that a failure to provide a statement of reasons is liable to render a decision erroneous in point of law notwithstanding that the duty to provide reasons arises only upon a request being made after the decision itself has been given, it seems to me that the decision is to be regarded as incomplete until reasons have been given and so regulation 57(1)(a) can apply where a document relevant to the production of a statement of reasons – rather than to the reasons themselves which, of course, should be formulated when the decision is given – goes astray after the decision has been given. It is difficult to conceive of any document other than a request for a statement of reasons that might fall within the scope of the provision. What is significant is that delay in the receipt of a request, due to non-receipt of an earlier request, may in itself make it impossible to comply with the request because the chairman's memory of the case is likely to have faded.

17. However, in the present case, there were other factors. In particular, the chairman's note of the tribunal's reasoning was lost and so, perhaps, was part of his note of evidence, although that is less clear. It is at any rate possible that the tribunal chairman would have been unable to produce a proper statement of reasons even if the request had been received in time. In those circumstances, a setting aside under regulation 57 might not have been appropriate. Furthermore, a decision is not to be set aside under regulation 57 unless it is "appears just" to do so. Setting aside under regulation 57 based on the non-receipt of a request for a statement of reasons is appropriate only where that non-receipt was clearly a cause of an inability to

produce a statement of reasons. I am therefore not prepared to treat the setting aside in this case as having been made under regulation 57.

18. The other remedy lies, of course, in an application to a Commissioner for leave to appeal. A Commissioner has wider powers than a chairman to grant leave to appeal due to the broad scope of regulation 9(3) the Social Security Commissioners (Procedure) Regulations 1999 (SI 1999 No 1495) and, in an uncontentious case, an appeal can be allowed very rapidly indeed.

19. When I granted leave to appeal in this case, I invited the Secretary of State to apply to me for leave to appeal against the decision of 27 June 2003. Consistently with his view that that decision had been validly set aside, he has not made such an application. The possibility of doing so remains open to him because he did make an application to a chairman before the "final date" and a Commissioner can probably treat the District Chairman as having rejected the application because no other option was open to him. However, if the Secretary of State wishes to pursue this course of action, he should do so promptly.

20. Meanwhile, the only decision that I can give is to allow the appeal of the claimant and hold the tribunal sitting on 27 January 2004 not to have had jurisdiction to determine his entitlement to disability living allowance because the relevant appeal had already been determined in the claimant's favour on 27 June 2003 and that earlier decision had not been validly set aside.

(signed on the original) **MARK ROWLAND**
Commissioner
2 November 2004