CDLA/4580/2003

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. I find that the decision of the appeal tribunal ("the tribunal") given on 12 August 2003 erred in point of law. I allow the claimant's appeal; I set aside the decision of the tribunal and, under section 14(8)(b) of the Social Security Act 1998, I remit the case to a differently constituted tribunal for rehearing.

2. The claimant is a woman born on 31 October 1957. She has back problems and angina. She has had a series of awards of the highest rate of the care component of disability living allowance since 1993, most recently, from 17 March 2001 to 16 March 2003. On 21 October 2002 she made a renewal claim, treated as being effective from 17 March 2003. Her general practitioner provided a medical report dated 27 October 2002, and on 7 January 2003 the decision maker decided that the claimant was not entitled to an award of either the care or mobility component of disability living allowance from 17 March 2003.

3. The claimant appealed, stating that she did not agree with the decision to stop her allowance because her situation had not changed, but was getting worse. The decision was reconsidered but not revised. The appeal proceeded.

4. A tribunal met on 20 May 2003, the claimant, her husband and representative being present. A copy of the decision given by a tribunal on 18 June 1993, awarding her the higher rate of the care component of disability living allowance from 17 March 1993 for 5 years, was submitted to the tribunal together with other papers from that claim. That tribunal adjourned for an examining medical practitioner's report to be obtained. The examination was carried out on 13 June 2003.

5. The tribunal then met on 12 August 2003, the claimant her husband and representative again being present. The claimant's representative asked the tribunal to consider the middle rate of the care component or alternatively the lowest rate of the care component for the cooking test, together with the higher rate of the mobility component. The tribunal concluded that the claimant was not entitled to an award of either component of disability living allowance.

6. The claimant sought leave to appeal on her own behalf, without a representative, challenging the tribunal's finding that her own admission was that she did not need the higher rate of the mobility component. In her covering letter she stated that she had been misled by her representative. Her night time needs were just as great as they had been previously. She had been told by her representative that she would not qualify for the higher rate mobility component, however her walking was worse.

7. She also submitted that the Decision Maker's decision of 7 January 2003 was based on a report from her general practitioner which had referred only to her angina. As she had suffered from angina only for 5 years, it followed that her previous awards had been based upon her back problems; therefore she had more disabilities than at the time of the previous awards.

8. I granted leave to appeal stating:

"The tribunal may have erred by finding that the appellant could walk a distance of at least 150 yards before the onset of severe discomfort, based on the opinion of the examining medical practitioner and the GP. Although this is supported by the examining medical practitioner's report at page 202, the GP's report states at page 101 that the distance the appellant can walk is "unknown", which is neutral."

9. The Secretary of State does not support the appeal. He refers to the claimant having told the examining medical practitioner that she was able to walk to the local shops, which the examining medical practitioner estimated to be 150 metres, before she had to stop due to back pain, and that it would take her 10 to 15 minutes to walk this distance. Against that, the examining medical practitioner's own estimate at pages 202 to 203 was that the claimant should be able to walk 400 metres before the onset of severe discomfort, in about 7 minutes.

10. The Secretary of State further submits that:

"8. When the tribunal stated in their Statement of Reasons for Decision that based on the evidence of the EMP and the claimant's GP the claimant was able to walk a distance of at least 150 metres, the tribunal were stating a conclusion based on fact. Although the claimant's GP had stated that they (sic) did not know what distance the claimant could walk before the onset of severe discomfort, it [is] clear that the tribunal interpreted that to mean that the claimant did not have any difficulty with walking and this view is supported by the GP being able to state that they did not know of any abnormalities of the claimant's gait, balance or speed of walking. I therefore submit that the tribunal had not erred in law in reaching the decision that the claimant was not virtually unable to walk".

11. I accept that it is clear that the tribunal interpreted the general practitioner's statement that he did not know what distance the claimant could walk before the onset of severe discomfort as meaning that the claimant did not have any difficulty with walking; what I do not accept is that the tribunal was right to make this interpretation. Although it is an interpretation often made, it is without justification. If a doctor cannot confirm that a patient has no walking problems, this raises an equal possibility that the claimant may have such problems. A tribunal should not conclude that general practitioners know a patient's overall condition, and would indicate if there were any problem. In many circumstances, the general practitioner completing the enquiry form may not know the claimant personally, and have no information from the patient's papers on which to base an opinion. In this case the claimant confirmed she knew the general practitioner "fairly well" according to the Record of Proceedings, yet he dealt only with her angina (see paragraph 14 below).

12. Where a general practitioner states "unknown" in response to the request for information as to the distance the claimant can walk before the onset of severe discomfort, the tribunal must treat that reply as neutral, in the absence of further qualification or amplification, and the doctor's comment is not a basis for a finding of fact. In this particular case, I contrast the reply of "unknown", given to the question as to walking ability with the reply to question 5 which states "please describe any abnormality of his/her gait, balance or speed of walking", where the same general practitioner in this case has replied "none known". That is an indication confirming there is nothing in the claimant's medical notes or his recollection of his patient which indicates any such problems.

13. Given this, I find that the tribunal placed too much reliance on the general practitioner's report as supporting the report from the examining medical practitioner. Also, whilst the examining medical practitioner recorded the claimant as stating she could walk to the shops before she had to stop for pain (page 191), there is no indication that he enquired as to the onset of severe discomfort, although he recorded, but did not explain his own view that she should be able to walk 400 metres before the onset of severe discomfort. The new tribunal will make its own findings on this aspect.

14. Although she made it plain only in seeking leave to appeal, there is also point in the claimant's observation that her general practitioner had limited his comments to angina which she had developed after she was first in receipt of disability living allowance. The general practitioner refers (page101) only to angina as the claimant's disabling condition and to its having been established since June 2001. Clearly, that was not the basis for the claimant's previous awards and as the decision reached by the disability appeal tribunal on 8 June 1993 was available to the tribunal and referred to "severe spinal injury (4 discs)", this information was before the tribunal. The examining medical practitioner did note degenerative spinal disease as one of the main conditions causing the claimant's disability. The tribunal itself also stated:

> "It is hard to understand why daytime needs continue but night time needs have ceased given that the claim in 1993 was based again on the question of spinal degeneration and the appellant has in the meantime acquired a condition of angina. The examining medical practitioner in 1993 has reached a different assessment from the examining medical practitioner in 2003 but the tribunal has to deal with the current medical evidence and the assessment of the most recent Examining Medical Doctor is supported by the appellant's GP ...
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> The appellant was able to confirm she had known her GP for a period of 3 years since she had previously been a patient of this GP's father. The tribunal felt therefore that the assessment of the GP was based on knowledge of the appellant and, when added to the report from the Examining Medical Practitioner did not suggest that the appellant qualified for any component of DLA. In meeting this conclusion the tribunal is differing from previous decisions but there is an acknowledgement by the appellant herself that she is not entitled to the previous award of the highest rate of the care component."

In the light of what I have said above, this confirms that the tribunal placed too much emphasis on the value of the general practitioner's report overall as support for that of the examining medical practitioner, resulting in inadequate findings of fact.

15. I am aware that the claimant has also complained of the advice received from her representative, and that the tribunal misinterpreted her hesitations before replying. As I am setting aside the tribunal's decision in any event, I do not need to deal further with these, but the claimant will take these points into account in preparing for the rehearing.

16. The new tribunal must conduct a complete rehearing of the issues that arise for decision in this case on both components of disability living allowance. It must make, and

record, full findings of fact on all necessary points, with reasons for its acceptance of the evidence which was preferred, and avoiding the errors I have identified.

17. It must not take account of circumstances which did not obtain at the renewal date, 17 March 2003, but must take account of any evidence which came into existence after that date, but which relates to circumstances as at that date. If the claimant is minded to submit any further medical evidence, she must bear in mind that this evidence must be linked to her condition as at that date.

18. Notwithstanding that the claimant feels she was not assisted by her previous representation, she is advised to seek advice from the Citizens Advice Bureau or a welfare rights organisation or from solicitors.

19. The claimant has also indicated that she was not aware that she could make a further application for disability living allowance whilst awaiting the outcome of this appeal. She is free to do so should she consider it appropriate. She will appreciate that this is not in any way a comment on the likely outcome of any such application, which would be dealt with on the evidence available at the time.

20. The claimant will bear in mind that my decision is limited to matters of law; the new tribunal will make its decision on the evidence before it, and the outcome may not assist the claimant.

21. For the reasons stated, the claimant's appeal succeeds; my decision is set out in paragraph 1, and my guidance in paragraphs 13 and 16 to 20.

(Signed) **E A Jupp**
Commissioner

(Date) **12 February 2004**