

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. My decision is given under section 14(8)(b) of the Social Security Act 1998. It is:

I SET ASIDE the decision of the Warrington appeal tribunal, held on 7 September 2004 under reference U/06/078/2004/00501, because it is erroneous in point of law.

I REMIT the case to a differently constituted appeal tribunal and DIRECT as follows.

The appeal tribunal must investigate and determine the claimant's capacity for work and entitlement to incapacity benefit on and from 11 December 2003. In doing so:

The appeal tribunal must not take account of circumstances that were not obtaining at that time see section 12(8)(b) of the Social Security Act 1998. Later evidence is admissible, provided that it relates to the time of the decision: *R(DLA) 2 and 3/01*.

The appeal tribunal must conduct a complete rehearing of the issues that are raised by the appeal and, subject to the tribunal's discretion under section 12(8)(a) of the 1998 Act, any other issues that merit consideration.

The issue and how it arose

2. This case concerns the tribunal's powers if a claimant fails to comply with a direction. In particular, the issue is whether the tribunal was entitled to refuse to admit evidence that was not provided in accordance with a timetable set by the tribunal.

3. The issue arises in this way. The Secretary of State decided that the claimant was no longer incapable of work or entitled to incapacity benefit on and from 11 December 2003. The claimant exercised his right of appeal against that decision. The appeal came before an appeal tribunal on 20 July 2004. The tribunal adjourned, with these directions;

'DWP within 28 days to produce copies of the previous medical reports in relation to the decisions made in 1996 and 1999, and also to produce a further submission dealing with the previous successful all work test.

'The appellant within 28 days to forward to the Appeals Service any other documentation upon which he intends to rely at the hearing.'

It is clear from the decision notice that these directions were given by the tribunal and not by the chairman under the power conferred on him by regulation 38(2) of the Social Security and Child Support (Decisions and Appeals) Regulations 1999.

4. The hearing was resumed on 7 September 2004. The chairman set out what happened in paragraph 4 of his statement of the reasons for the tribunal's decision:

'As the hearing progressed the appellant referred to documents which were not within the schedule and which he wished to produce. He was asked why he had not produced

them as directed and did not answer the question and indeed was vague as to whether the documents were the documents which he had with him at the earlier tribunal or whether they were documents that had subsequently been obtained. The tribunal were aware that the appellant had been given plenty of time to produce these documents and indeed had been directed to forward any further documents to the Appeals Service within 28 days of the last hearing. This he had failed to do. In the circumstances the tribunal were not prepared to accept any further documentation from the appellant or indeed anyone else. The last tribunal had been specifically adjourned for documentation to be produced. The appellant had not complied with the direction. In the circumstances the tribunal indicated to the appellant that they would not accept any documents now on the day especially as he sought to produce them after the hearing had been underway for some 40 minutes.'

The law of evidence

5. There is no principle of the law of evidence that allows a tribunal to refuse to hear evidence that is submitted outside a time limit imposed by a direction. If the tribunal was entitled to exclude this evidence, it must be authorised under its power to give directions.

Adjournments and directions

Analysis

6. An appeal tribunal has power to adjourn a hearing on application or of its own motion. It is expressly conferred by regulation 51(4) of the Social Security and Child Support (Decisions and Appeals) Regulations 1999 on tribunal itself, not its chairman, and is additional to the legally qualified panel member's power to give directions under regulation 38(2).

7. A tribunal is entitled to adjourn generally or to do so on terms. The only limit on the imposition of terms is that the tribunal must exercise the power judicially. In the modern jargon, the terms will be case management directions for the future conduct of the proceedings.

8. In some cases, it may seem that there is no need for directions. For example, the adjournment may be granted because the claimant is ill and cannot attend. However, even in these cases it is good practice for a tribunal, which will have read the papers, to consider whether any directions would assist the further conduct of the case.

9. Directions may be appropriate for a variety of reasons. Some claimants do not prosecute their appeals. Others purport to want their day in tribunal, but connive to postpone it for as long as possible. But for most claimants whose cases come on for hearing, the purpose of directions is to provide guidance and assistance on what evidence is required and when and how it should be produced. Underlying this is a proper concern by tribunals that appeals should be handled efficiently and that tribunals should have the evidence to allow soundly-based decisions. This is an aspect of the enabling approach which forms part of the philosophy on which tribunals' procedure is based.

10. The appropriate response to a failure to comply with a direction depends on the circumstances of the case and the purposes for which the direction was given. If the case comes on for hearing, the response must be consistent with the principles of natural justice and the claimant's Convention right to a fair hearing. In some circumstances, the appropriate response is to strike out the appeal. In other circumstances, the appropriate response may be to draw inferences adverse to the party who has failed to comply with a direction. But the availability of a penalty is not an essential feature of a direction. Directions, like rules of procedure and law, ultimately and mainly depend for their effectiveness on consent and co-operation, not on enforcement or penalties.

What was the appropriate response in this case?

11. One purpose of the direction was to ensure that the relevant evidence was available for the resumed hearing. It was available for the tribunal to consider if it had read it.

12. Another purpose was to provide the tribunal with the chance to consider the evidence in advance of the hearing. The claimant's action deprived the tribunal and the presenting officer of that advantage. But did that justify the tribunal refusing to hear the evidence? It was appropriate to investigate whether the evidence now available could have been produced earlier. If it had only recently become available, the tribunal could hardly have refused to hear it. Unfortunately, the claimant's answers were not informative on this point. But even if the evidence could have been produced in accordance with the direction, the fact remains that tribunals and presenting officers are used to dealing with evidence produced at the last minute. There is also the consideration that what claimants consider relevant and decisive is not always either. It often takes a tribunal but a few moments to read evidence sufficiently to absorb its import and to realise its significance to the case. That is one of the skills required of members.

13. A third purpose was to provide a timetable for the submission of evidence and thereby to avoid delay. But on examination this really adds nothing to the other purposes. The production of evidence disrupted the timetable, but as I have explained it would not have significantly disrupted the hearing. A fair hearing was still possible for both the claimant and the Secretary of State if the tribunal had read the evidence that the claimant wanted to produce.

14. Finally, the purpose of the direction was to guide the parties in what was expected of them. In this respect there was a difference between the Secretary of State and the claimant. Those who represent the Secretary of State understand the advantages of complying with directions. So do experienced advisers who represent claimants. But claimants who act for themselves may not understand. Those of us who are used to the ways of the law understand the significance of directions. Those who are not so familiar may not do so. Their interpretations may seem surprising, even incomprehensible to us. But it is a mistake to assume that others understand as lawyers do.

15. All the parties are entitled to a fair hearing. But what is required may differ as between the parties. The Secretary of State and an unrepresented claimant are not equally informed. The equality of arms aspect of the Convention right to a fair hearing and the enabling approach to a tribunal's procedure overlap and combine to allow and require the tribunal to redress the imbalance between the parties. That imbalance includes the difference in

understanding. The tribunal's response to a failure to comply with a direction has to take account of that imbalance.

Conclusion

16. In this case, the tribunal of 20 July 2004 was entitled to adjourn for further evidence to be produced and to set the timetable that it did. Those directions entitled it to refuse to allow the claimant a further time in which to produce evidence, subject of course to some exceptional circumstance that meant that relevant evidence had only lately become available. But taking account of all the circumstances of this case, to refuse even to look at the evidence was not a proportionate response to the claimant's failure to comply with the direction in the circumstances of this case. The tribunal could and should have considered the evidence. It could have done that without undermining the purposes for which the directions were given. To do so would have furthered the enabling approach and the equality of arms requirement. By declining to do so, that tribunal denied the claimant a fair hearing. By doing so, it went wrong in law.

Evidence in the papers

17. The claimant has asked me to deal with his complaint that some of the evidence should not have been included in the papers. The evidence consists of a medical adviser's report for a previous personal capability assessment in 2002. The claimant says that that evidence should be excluded because it was subsequently found to be inaccurate in an appeal in 2003. I reject this argument. The assessment of that evidence by the tribunal in 2003 is not binding on the tribunal that rehears this case. But having said that, I doubt whether the evidence will be of any significance, as it is difficult to relate to the circumstances obtaining at the time of the personal capability assessment in this case.

Disposal

18. I allow the appeal and direct a rehearing.

**Signed on original
on 14 January 2005**

**Edward Jacobs
Commissioner**