AWEW/SH/5

Commissioner's File: CDLA/2481/95

SOCIAL SECURITY ACTS 1975 TO 1990

SOCIAL SECURITY ADMINISTRATION ACT 1992

CLAIM FOR DISABILITY LIVING ALLOWANCE

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. My decision is that the decision of the Colwyn Bay disability appeal tribunal given on 30 November 1994 is erroneous in point of law and, accordingly, I set it aside. The case is referred to a differently constituted disability appeal tribunal for a rehearing.

2. This is the claimant's appeal, with the leave of a Commissioner on a point of law, against the unanimous decision of the appeal tribunal of 30 November 1994, confirming the decision of the adjudication officer on review, that the claimant is not entitled to the care component of disability living allowance.

3. The factual background to the appeal is sufficiently set out in the findings of fact recorded by the appeal tribunal:-

" 1 Claimant is a 55 year old man who lives alone.

2 Claimant had a heart transplant in 1988 and has had no serious rejection. He does suffer from stiffness associated with arthritis and from exhaustion which sometimes causes a shortness of breath.

3 Claimant is in receipt of higher rate mobility component of Disability Living Allowance and applied

for care component on 19 05 94 which was disallowed by the Adjudication Officer. Claimant has appealed this decision.

4 Claimant is able to attend to his bodily functions although he finds life "exhausting". He takes longer to perform certain tasks because of his tiredness. He would find it difficult to lift heavy pans.

5 Claimant can manage his toilet needs although sometimes at night he is "too tired" to get to the toilet in time which results in bed wetting or soiling.

6 Claimant occasionally feels giddy/dizzy and stumbles but there is no history of actual falls.

7 Claimant is mentally competent."

4. On the basis of those findings of fact, the appeal tribunal gave their reasons for disallowing the appeal in terms that "the tribunal found that the claimant does suffer from tiredness and arthritic pain but is not severely disabled physically or mentally and his needs are not such that he qualified for the care component within section 72 of the Social Security Contributions and Benefits Act 1992".

5. The claimant seeks to impugn that decision on the ground that the appeal tribunal failed to give adequate reasons for their decision. In particular, the main criticism of the claimant's representative is that no reference was made to the supportive evidence of the claimant's general practitioner which, I observed, stressed, amongst other things that the claimant was a man who "makes very light of his disability" coupled with the failure on the appeal tribunal to assess the claimant's needs in terms of what was reasonably required on the authority of R(A) 3/86.

6. The adjudication officer now concerned with this case supports the claimant's appeal on those grounds. In her succinct submissions dated 9 August 1995, she has this to say in paragraphs 14, 15 and 16:-

" 14. I submit that it was incumbent on the tribunal to make findings of fact on how long it took the claimant to attend to his own bodily functions and also how long it would take him to attend to his bodily functions with assistance from another person. I submit that once these findings of fact have been made the tribunal needed to go on to explain and decide whether the help claimed was reasonably required. It is my submission that the length of time taken for a person to attend to their bodily functions can determine whether help is reasonably required. I submit that this is a matter of fact and degree and that there comes a point when if it takes so much longer that help can only be considered to be reasonably required. I submit that the

insufficient findings of fact in this respect constitute an error in law.

15. I submit that the question before the tribunal was whether attention and/or supervision was required not whether it was in fact provided. I draw support for this submission from the Commissioner's decision R(A) 1/73. In paragraph 15 of this decision the Commissioner held that -

> "..... Attention and supervision in my judgment can clearly overlap and be provided simultaneously. The question of course is whether supervision was required, not whether it was in fact provided. But the Board would probably agree that evidence that supervision (or attention was in fact provided is strong evidence that it was required; mothers would be unlikely to exhaust themselves by providing it unnecessarily for years."

16. The tribunal concluded that "the claimant does suffer from tiredness and arthritic pain but is not severely disabled physically or mentally and his needs are not such that he qualifies for the care component within Section 72 of the Social Security Contributions and Benefits Act 1992". I submit that the Commissioner in his decision CDLA/42/94 accepted the submission of the claimant's representative that in relation to section 73(1)(d) of the Contributions and Benefits Act there is no separate test that the claimant be severely disabled and that severity must be tested by whether the claimant meets the other conditions of the provision. I submit that the Commissioner's ruling on this point applies equally to section 72 of the Contributions and Benefits Act."

7. In my view those submissions are soundly based and I am content to accept and adopt them. It is, I believe, only the last point which calls for comment. There are, I understand, dicta of Commissioners which suggest that the expression "so severely disabled physically or mentally" in section 72(1)(a) of the 1992 Act means that for a claimant to get his case off the ground he must first show that he suffers from severe physical or mental disability. I dissent from any such view for the reason that I am unable to square such an approach with the clear and unambiguous language of the section when read as a whole. The words used repetitively in section 72(1)(a) and (b) "so severely disabled physically or mentally that .. he requires .." seem to me to unequivocally point to the fact that the test of severity is whether the claimant makes out the other relevant requirements of those provisions.

8. The result is that, for the reasons I have given, the appeal tribunal's decision was flawed in law as being in breach of the requirement to make adequate findings of fact and to give adequate reasons for the decision. It follows that their decision must be set aside and the case referred to a differently constituted disability appeal tribunal for determination. That

will be a complete rehearing and all issues of fact and of judgment will be at large. The claimant and his representative will doubtless prepare their case accordingly.

9. The claimant's appeal is allowed.

Signed: A W E WHEELER
Commissioner

Date: 02 APR 1996