

1. My decision is that the decision of the Lancaster Disability Appeal Tribunal held on 17th February 1999 is not erroneous in point of law.

### **The appeal to the Commissioner**

2. This is an appeal to a Commissioner against the decision of the Disability Appeal Tribunal brought by the adjudication officer with the leave of a full-time chairman of tribunals. The claimant's representative has commented on the appeal.

### **Changes made by the Social Security Act 1998**

3. The Social Security Act 1998 is being brought into force in stages over this summer and autumn. So far as Disability Living Allowance is concerned, it came into force on 18th October 1999. The Act abolished the title and status of adjudication officers, transferring their functions to officers acting in the name of the Secretary of State. From that date, the Secretary of State replaced the adjudication officer as a party to this appeal. Apart from this, the changes in the law have not affected the claimant's appeal to the Commissioner or its outcome.

### **The history of the case**

4. The claimant's claim for a Disability Living Allowance was treated as made on 5th February 1998. In the claim pack, the claimant asserted difficulties with walking, with care and with cooking. The claimant also reported falls. The claimant has been diagnosed as having post viral fatigue syndrome. A report was obtained from an Examining Medical Practitioner. When the report was received, the adjudication officer refused the claim.

5. The claimant applied for a review of the decision. A different adjudication officer reviewed the decision under section 30(1) of the Social Security Administration Act 1992, but confirmed the refusal of the claim.

### **The appeal to the Appeal Tribunal**

6. The claimant appealed against the decision given by the adjudication officer on the section 30(1) review. The claimant attended and gave evidence at the hearing of the appeal, accompanied by a representative from his local Welfare Rights Service.

7. The tribunal awarded a Disability Living Allowance consisting of the mobility component at the higher rate and the care component at the lowest rate on the basis of the cooked main meal test for the inclusive period from 5th February 1998 to 4th February 2001.

### **The grounds of appeal**

8. The adjudication officer's grounds of appeal are that (a) the tribunal made no findings on whether the claimant's mobility difficulties were consequent on a physical disablement, (b) the tribunal did not explain why it rejected the evidence of the Examining Medical

Practitioner and (c) the tribunal did not make clear whether the evidence on which it relied complied with section 12(8)(b) of the Social Security Act 1998. I reject the grounds of appeal.

*Physical disablement and chronic fatigue syndrome*

9. The claimant has been diagnosed as having post viral fatigue syndrome. This is one of a number of labels that are given to what I take to be essentially the same condition. Chronic fatigue syndrome appears to be the preferred modern label. When this diagnosis first became prevalent, there was disagreement about the nature of this condition. In particular, there was argument about whether or not the condition was physical or mental in origin. This was relevant to the mobility component at the higher rate, because of the terms of the legislation. Section 73(1)(a) of the Social Security Contributions and Benefits Act 1992 provides that an award may only be made if the claimant "is suffering from physical disablement" and regulation 12(1)(a) of the Social Security (Disability Living Allowance) Regulations 1991 provides that the claimant's limited mobility must be a result of "his physical condition as a whole".

10. In that state of uncertainty, Commissioners naturally required tribunals to make findings of fact on whether claimants with chronic fatigue syndrome had a physical disablement and whether their mobility was limited by their physical condition. See, for example, the decision of the Commissioner in CSDLA/176/1994, on which the adjudication officer relies.

11. The medical understanding of chronic fatigue syndrome has developed. In 1996, a joint report was issued by the Royal Colleges of Physicians, Psychiatrists and General Practitioners. The report is summarised in the Volume 30, Number 6 of the Journal of the Royal College of Physicians of London at pages 497 to 504. The report recognised that the syndrome could not be classified as either physical or psychological, but consisted of a mixture of both. The report is well known within the medical profession and, therefore, to those medical practitioners who sat as members of Disability Appeal Tribunals and who now sit as members of the new Appeal Tribunals. Against the background of that report, the decisions of Commissioners like CSDLA/176/1994 need to be reconsidered. A tribunal is now entitled to treat the claimant's chronic fatigue syndrome (by whatever name it is called) as involving a physical element that is capable of supporting an award of the mobility component at the higher rate. This is subject to three qualifications.

11.1 First, of course the other conditions for an award must be satisfied.

11.2 Second, there must be nothing to suggest that the claimant's mobility is wholly or largely limited by the mental component of the syndrome, if it is possible to disentangle them from the physical component.

11.3 Third, a tribunal must deal with a specific contention made by a party to the proceedings. So, if the issue is raised whether the claimant's mobility is limited by a physical disablement and condition, the tribunal must give reasons for its conclusion on the issue and record findings of fact to support that conclusion.

12. Applying those principles to this case shows that the tribunal's decision was not erroneous in law on this count.

12.1 The tribunal found that the other conditions for an award were satisfied.

12.2 The lack of physical findings is not sufficient to show that mobility is affected by the mental component only. The lack of physical findings is a general, if not universal, feature of the syndrome. So, the evidence did not raise the issue of the cause of the claimant's limited mobility.

12.3 The issue was not raised by the adjudication officer. The adjudication officer's decision under section 30(1) of the Social Security Administration Act 1992 was not based on the cause of the limited mobility. The submission to the tribunal did not raise the issue. The chairman's record of proceedings does not record a submission on the issue by the presenting officer at the hearing.

In these circumstances, the tribunal did not need to deal with the point.

#### **Preferring the claimant's evidence to that of the Examining Medical Practitioner**

13. It is obvious that the tribunal believed the claimant's evidence on the extent of his disablement. If this evidence was inconsistent with that of the Examining Medical Practitioner, the tribunal should have explained why it preferred the evidence that it did. However, the evidence from the claimant was not inconsistent with the evidence from the Examining Medical Practitioner. It is the nature of the syndrome that there is an absence of physical signs, as the Practitioner noted in the report. As there was no inconsistency, the tribunal did not need to explain why it accepted evidence from the claimant which, given his diagnosis, was consistent with the other evidence.

14. As far as the cooked main meal test is concerned, the Examining Medical Practitioner gave the opinion that the claimant would have difficulty in using a cooker. The nature and extent of that difficulty was not set out. The tribunal found that the claimant lacked the energy to cook a meal. It was entitled to make that finding on the evidence. It was not inconsistent with the lack of physical signs and it was consistent with the evidence of the Examining Medical Practitioner that the claimant would have difficulties using a cooker.

15. The adjudication officer also argues that the tribunal should have explained why lack of energy was consistent with the hypothetical test set out by the Commissioner in R(DLA) 2/95. This was not necessary. The tribunal had to decide as a matter of fact whether the claimant can cook a main meal for himself. The lack of energy described by the claimant entitled the tribunal to find as a proper use of the word can that the claimant satisfied the conditions of entitlement.

#### **Section 12(8)(b) of the Social Security Act 1998**

16. Finally, the adjudication officer argues that the tribunal "were further required to state the extent to which the evidence they preferred predated the AO's decision against which the appeal was lodged in the light of the provisions of paragraph 3 of Schedule 8 to the Social

Security Act 1998 relating to the limiting of consideration of circumstances to those obtaining before that decision." The reference should be to Schedule 6. I refer to section 12(8)(b) which is in the same terms.

17. This submission is misconceived. It is not the date on which the evidence was written or spoken that matters, but the date to which that evidence relates: see my decision in CDLA/2934/1999, paragraph 9. Perhaps this is what the adjudication officer meant by "predated".

18. I can see no respect in which the tribunal may have had regard to circumstances not obtaining at the date of the decision of the adjudication officer under section 30(1). The tribunal's findings of fact on mobility refer to a walking distance that can only have come from the application for the review and to a speed of walking that came from the report of the Examining Medical Practitioner. The evidence on which those findings were based must relate to the position before the date of the decision under appeal as the application and the report were written before that decision was given. As to cooking, the tribunal's findings were justified by the evidence of the Examining Medical Practitioner and the claimant's evidence in the claim pack. It was not necessary for the tribunal to set out the evidence on which it relied in this case, as it can be easily identified. However, it is good practice, if there is evidence of a change of circumstances after the date of the decision under appeal, to identify the evidence on which the tribunal's decision was based in order to show that it complied with section 12(8)(b).

#### **Summary**

19. The tribunal analysed the evidence rationally and in accordance with common sense. It made findings of fact that were supported by the evidence. It applied the correct law to the facts, and reached a decision that it was entitled to reach on those findings. It did not consider circumstances that arose after the date of the decision under appeal. The statement of the tribunal's reasons was not a model to be followed, but in the circumstances of the case it contained a statement of the reasons for the tribunal's decision that was just adequate. There was no breach of the principles of natural justice. The tribunal's decision is not erroneous in law.

**Signed: Edward Jacobs  
Commissioner**

**Date: 14th December 1999**