

Before S M Lane

My decision is given under section 12(2)(a) and (b)(i) of the Tribunals, Courts and Enforcement Act 2007:

I SET ASIDE the decision of the Appeals Tribunal, held on 30/01/08 under reference 231/08/00251, because it involved the making of an error on a point of law.

I REMIT the case for rehearing before a differently constituted First Tier Tribunal (Social entitlement Chamber) and DIRECT that the tribunal conduct a complete rehearing.

REASONS FOR DECISION

1. This is a claimant's appeal, for which I gave leave as a Commissioner, and which is now dealt with under the Tribunals, Courts and Enforcement Act 2007. The appeal is against the decision of the tribunal not to award either component of DLA from and including 24/07/07.
2. Neither party objects to my setting aside the decision on the ground identified in my determination of 6/10/08, that the tribunal erred in law in restricting too closely both the range of foods and need to cut and chop raw ingredients, in its application of the cooking test as the basis of an award of the lowest rate of care.
3. The tribunal accepted the Examining Medical Practitioner's clinical findings that the claimant's left fist and pincer grip were significantly reduced but that her right (dominant) hand was less disabled and her fist grip was normal. It accepted evidence that the claimant could cope with soft vegetables and ingredients such as fish, but that vegetables such as turnip and carrots might well be difficult for her. It concluded 'it is not unreasonable in the tribunal's view for these to be avoided other vegetables are available and bearing in mind she can make a fist the tribunal consider that peeling, for example, a potato, should be manageable by her.'
4. The cooking test is a hypothetical test requiring the tribunal to exercise its judgment in determining whether, in a general sense, the claimant can fairly be described as a person who is unable to cook a meal over a period of time. The determination is ultimately one of impression - *Moyna v Secretary of State for Work and Pensions* [2003] 4 All ER 162. The thought experiment requires an assessment of the claimant's ability to prepare a meal involving chopping, cutting and peeling fresh ingredients, which include a wide range of hard vegetables.

5. The tribunal thought the claimant could reasonably avoid carrots and turnips because other vegetables were available. This simply avoided the basic question of whether the claimant could perform a standard range of preparation tasks in relation to a standard range of foods, which would include a good number of hard vegetables. The tribunal erred, in the end, by failing to carry through the thought experiment far enough.

6. The case is accordingly remitted to make the necessary findings of fact.

S M Lane
Judge of the Upper Tribunal
5 November 2008