

MJG/SH/6

Commissioner's File: CDLA/494/94

SOCIAL SECURITY ACTS 1975 TO 1990

SOCIAL SECURITY ADMINISTRATION ACT 1992

CLAIM FOR DISABILITY LIVING ALLOWANCE

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. I allow the claimant's appeal against the decision of the disability appeal tribunal dated 20 April 1994 as that decision is erroneous in law and I set it aside. I remit the case for rehearing and redetermination in accordance with the directions in this decision to another disability appeal tribunal: Social Security Administration Act 1992, section 34.

2. This is an appeal to the Commissioner by the claimant a married woman born on 6 April 1943. The appeal is against the unanimous decision of a social security appeal tribunal dated 20 April 1994 which dismissed the claimant's appeal from a review decision of the adjudication officer notified on 14 July 1993, to the effect that the claimant was not entitled to any component of disability living allowance. Appeal to the Commissioner in

this jurisdiction lies only on questions of law. On issues of fact, medical opinion, diagnosis etc., the decision of the disability appeal tribunal is final. Much of the material that has been placed before the Commissioner in this case is either factual or medical in nature. Such issues must be dealt with entirely by the new tribunal to whom I have remitted this case.

3. However, I accept the concurring submissions of the claimant's representative (in a letter dated 14 June 1994) and of the adjudication officer now concerned (in a detailed submission dated 17 March 1995), to the effect that the tribunal in this case did not altogether give adequate reasons for decision and make sufficiently detailed findings of fact. That being said, I am bound also to say that it appears to me that the tribunal in this case took great care with what is a difficult case. For that reason I have varied the normal rule in section 34 of the 1992 Act (requiring remission to an entirely differently constituted tribunal) to provide that in effect the new tribunal that hears this case can be constituted with one or more of the members of the original tribunal that heard the case. That is not essential but might well be helpful if it can be arranged.

4. The new tribunal will have the detailed medical and factual evidence before it. Suffice it to say that, unfortunately, the claimant suffers from considerable problems of incontinence, both urinary and faecal, which may be connected with previous treatment she has had for cancer of the cervix. Her case before the original tribunal was that she was entitled to mobility allowance at the lowest rate under section 73(1)(d) of the Social Security Contributions and Benefits Act 1992, namely she contends that she "... is able to walk but is so severely disabled physically or mentally that, disregarding any ability [she] may have to use routes which are familiar to [her] on [her] own, [she] cannot take advantage of the faculty out of doors without guidance or supervision from another person most of the time".

5. The claimant points to the difficulties which the sudden urgency and nature of her incontinence can cause when she is walking and states that she never goes out on her own. In paragraphs 11-14 of the adjudication officer's submission, she submits that the tribunal's treatment of this matter was not entirely correct in relying on their conclusion that the claimant should "be able to go out, albeit to a limited extent". The adjudication officer submits that that is not directly connected with the tests in section 73(1)(d) and the real question was whether the claimant needed "guidance or supervision" to take advantage of the faculty of walking out of doors.

6. On the question of what is meant by guidance or supervision in this context, the adjudication officer cites decisions on Commissioners' files CDLA/042/1994 and CDLA/240/1994 and the new tribunal may derive assistance from these. In paragraphs 15 and 16 of the submission the adjudication officer says,

"It is said that the claimant needs supervision in case of incontinence. It is my submission that monitoring by another person could not detect an incidence of incontinence before the claimant herself became aware of it, or prevent its happening. In my submission such incidents will occur whether or not the claimant is supervised and therefore are not related to the absence of supervision. In this case the more significant question is whether, having been incontinent, the claimant requires guidance or supervision to deal with its effects. It is reported that the claimant is unable to cope at such times, but the tribunal has failed to establish in what respect she is unable to cope, what she is unable to do and why. This aspect has not been addressed by the tribunal."

7. The claimant's representative in observations dated 13 June 1995 (paragraph 3) takes issue with the adjudication officer's conclusion that the claimant cannot be said to require or need supervision in such circumstances. The claimant's representative adds,

"The fact that supervision would not prevent incontinence occurring is not in my submission relevant. The purpose of supervision is not confined to the prevention of untoward incidents (as with, say, a blind person walking out of doors), but extends to the need to deal with the aftermath of such incidents (as with, say, epilepsy where, similarly supervision does not prevent an attack). If the claimant in this case is enabled to walk out of doors in unfamiliar areas by such supervision (because only with supervision has she the assurance of being able to cope with the effects of her incontinence), then, I submit, the conditions of section 73(1)(d), as elaborated on in CDLA/42/94, are satisfied."

8. I note that in paragraph 18 of the adjudication officer's submission, she says,

"Not only would a companion be unable to detect or prevent the onset of the claimant's incontinence and could not therefore be exercising supervision within the terms of section 73(1)(d); but also, I submit, the need to find a toilet does not demonstrate the need for such supervision."

9. Although I well understand the points being put forward by the adjudication officer, I conclude that in fact it is taking too narrow a view to say that supervision would not necessarily assist the claimant in walking out of doors. It is, of course, walking out of doors, particularly in an unfamiliar area, that may give rise to a crisis and panic over a sudden attack of incontinence. To have supervision from a companion would enable the claimant to walk out of doors in an unfamiliar area in circumstances where she might feel terrified to undertake such a walk on her own. The new tribunal will therefore need to look into this question as essentially a question of fact but in law my direction as to the meaning of supervision and guidance in the

circumstances is as stated above, i.e. those terms must not be too narrowly applied to the facts of this case.

10. As to the care component of disability living allowance the adjudication officer at paragraphs 19-25 of her submission draws attention to the fact that what is in issue here is the requirement of "frequent attention throughout the day in connection with [her] bodily functions" (section 72(1)(b)(i) of the Social Security Contributions and Benefits Act 1992). The original tribunal erred in requiring the attention to be "continuous" whereas all that the section requires is that it should be "frequent". However, the adjudication officer then goes on to submit that the reassurance needed for the claimant in incontinence emergencies could not constitute "attention from another person" within the meaning of the provision. She points out "there is no evidence of any disability which prevents the claimant from being able to clean herself after she has been incontinent ...".

11. On the other hand the claimant's representative in his representations of 13 June 1995 submits as follows,

"I also do not agree with the adjudication officer's submission at paragraphs 22-24 that reassurance cannot amount to attention in connection with the bodily functions. At paragraph 24 the adjudication officer argues that reassurance does not assist in the performance of a bodily function and hence cannot be reasonably required. I disagree with both the premise and conclusion of this syllogism. I submit that reassurance may directly assist in the performance of a bodily function; and that reassurance can be reasonably required in connection with that function even if it does not so assist. The adjudication officer also submits at paragraph 23 that reassurance cannot amount to 'attention in connection with the bodily functions' because it is not of a sufficiently close and intimate nature. I submit that this depends on the bodily function and the reassurance and that, in the case of incontinence, reassurance and verbal encouragement and advice can readily be sufficiently close and intimate in nature."

12. I regard as the differences between these views as essentially differences of fact rather than law. Certainly in law the reassurance and moral support which a companion could give to the claimant when she was suffering from an attack of incontinence could I think constitute "attention" in connection with the claimant's bodily functions. It all depends on the nature of matters, e.g. how great is the incontinence and how extreme the emergency. One must also look at the nature of the reassurance and assistance eg. helping someone to get to the toilet could be "attention". These are essentially matters for the new tribunal. What may well be more to the point is whether or not it could be said that such attention, if such it is, is "frequent" but again I leave that matter to the new tribunal.

13. Lastly I should just mention a matter that is raised by the adjudication officer now concerned in connection with the date of claim. At paragraph 26 of her submission of 17 March 1995 that officer says,

"For completeness, I submit that the evidence regarding the date of this claim appears to be incomplete. The claim does not indicate the date on which it was requested by the claimant and there is no additional information on this subject within the appeal document. It is therefore my submission that in the absence of any such evidence regulation 6(8A) of the [Social Security (Claims and Payments) Regulations 1987] is applicable in this case -

'Where, in a case which would otherwise fall within paragraph (8), it is not possible to determine the date when the request for a claim form was received in the appropriate office because of a failure to record that date, the claim shall be treated as having been made on the date 6 weeks before the date on which the properly completed claim form is received in an appropriate office.'

I leave to the new tribunal this question of date of claim, if it should become relevant.

Signed: M J GOODMAN  
Commissioner

Date: