Commissioner's Case No: CSDLA/820/04

DECISION OF SOCIAL SECURITY COMMISSIONER

Decision

1. The decision of the Glasgow appeal tribunal (the tribunal) held on 10 September 2004 is wrong in law. I therefore set it aside and remit the case for rehearing by a new tribunal.

Error of law

Breach of the rules of natural justice

2. The background to the appeal is that a new claim for disability living allowance (DLA) received a decision by a decision maker (DM) on behalf of the Secretary of State that the appellant was not entitled to the mobility component of DLA from and including 30 December 2003 but was entitled to the lowest rate of the care component thereof on an indefinite basis from the same date on the basis of the cooked main meal test. On his appeal, the tribunal accepted a concession from the representative that mobility was not an issue but only the question of potential entitlement to the middle rate of the care component of DLA because of a need for frequent attention; the tribunal then held:

> "The appeal was allowed. The Appellant was entitled to care component at the lowest rate only with effect from 30.12.03 to 29.12.05, because he satisfies the main meal criteria".

3. There was no warning during the hearing to the appellant or his representative that the tribunal was considering thus reducing the period of the award given by the DM. This was a breach of the rules of natural justice.

4. Under section 12(8)(a) of the Social Security Act 1998 an appeal tribunal "need not consider any issue that is not raised by the appeal"; however, as confirmed by a Tribunal of Commissioners in R(IB) 2/04, an appeal tribunal has full jurisdiction to consider such issues if it wishes to do so. The Tribunal of Commissioners (see paragraph 90) pointed out that "....issues not raised by an appeal are in their nature quite likely to be issues as to whether the tribunal should make an award less favourable to the claimant than did the Secretary of State".

5. In R(IB) 2/04 the Tribunal of Commissioners was considering the following specific situation (see paragraph 83):

> "When a claimant appeals against a decision refusing to accede to his application for supersession (or acceding to the application but not making a decision as favourable as the claimant wished), does an appeal tribunal have power to supersede the original decision on a ground which leads to a less favourable award than the superseded award?".

6. This is accordingly distinguishable from the present case, which concerns a new claim. However, in principle, the point is still directly analogous; the appellant seeks a more favourable award and the question remains whether the appeal tribunal has power to change the original decision on a ground which leads to a less favourable award than the one under appeal? The answer must thus be "yes" in both instances.

7. However, that is a wide power which arises for a tribunal on an appeal; therefore, the safeguards for the claimant set out by the Tribunal of Commissioners are rightly applicable where any decision is altered by a tribunal on a ground which leads to a less favourable award than the decision under appeal, rather than a tribunal simply confirming that adverse decision in the terms formulated by a DM.

8. At paragraph 94 of R(IB) 2/94 the Tribunal said:

> "There must, however, be a conscious exercise of this discretion and (if a statement of reasons is requested) some explanation in the statement as to the reasons why it was exercised in the manner it was. In exercising the discretion, the appeal tribunal must of course have in mind, in particular, two factors. First, it must bear in mind the need to comply with Article 6 of the Convention and the rules of natural justice. This will involve, at the very least, ensuring that the claimant has had sufficient notice of the tribunal's intention to consider superseding adversely to him to enable him properly to prepare his case. The fact that the claimant is entitled to withdraw his appeal any time before the appeal tribunal's decision may also be material to what Article 6 and the rules of natural justice demand....".

9. In my judgment, the reasoning above applies *mutatis mutandis* to the present circumstances. The tribunal had full jurisdiction once an appeal was before it, if the facts and law demanded it, to leave the appellant in a worse situation than before he came to the tribunal. However, before it did so, it was imperative that the process of so doing was fair and transparent. The tribunal erred in law in failing to afford the appellant a proper opportunity to face and, if possible, prevent the tribunal considering in an unfavourable way an issue of entitlement not raised by the Secretary of State.

Summary

10. The appeal is therefore remitted to a new tribunal to begin again. It is emphasised that there will be a complete rehearing on the basis of the evidence and arguments available to the new tribunal, and in accordance with my guidance above, and the determination of the claimant's case on the merits is entirely for them. Although the claimant has been successful in his appeal limited to issues of law, the decision on the facts in his case remains open.

(Signed)
L T PARKER
Commissioner
Date: 20 January 2005