

~~tribunal~~ fair hearing -
mere presence of EMP does not compromise appearance of independence -
must also be EMP report in evidence -
extra-test for children.

DECISION OF SOCIAL SECURITY COMMISSIONER

Commissioner's Case No: CSDLA/91/03

1. The decision of the Ayr appeal tribunal (the tribunal) held on 9 July 2002 is wrong in law. Accordingly, I set it aside and remit the case for rehearing by a differently constituted tribunal.

2. It is noted that the claimant on a new claim has been awarded disability living allowance (DLA) at the middle rate of care component and the lower rate mobility component for the period 27 July 2002 to 26 July 2005. What is in issue in this case was a claim for DLA on 25 October 2001. The adverse decision now under appeal again to a new tribunal is that of a decision maker (DM) who on 3 December 2001 determined that there was no entitlement to DLA, either component at any rate, from 25 October 2001. Before the appeal is remitted for rehearing, the Secretary of State is to lodge a written submission for the benefit of the parties and the new tribunal, attaching any medical evidence received for the purposes of the second claim, and indicating what is his current position on entitlement under the claim in issue.

Errors of law

Lower rate mobility component with respect to children

3. A copy of CA/92/92 should have been included in the papers for the tribunal by the Secretary of State as it sets out the correct approach to child claimants on the point that needs which arise must be "substantially in excess of the normal requirements of persons of [his] age". However the rationale of the case is conveniently set out on pages 151 and 152 of volume 1 of the annotated Social Security Legislation 2002. It makes clear that attention or supervision may be required "substantially in excess of that normally required", either by virtue of the time over which it is required or by virtue of the quality or degree of attention or supervision which is required. It is also emphasised that the yardstick against which those of the claimant's needs which result from disablement are to be measured is those which are required not simply by many but by most children in the same age group.

4. CA/092/92 relates to care needs. However, the additional child condition is also applicable to lower mobility, expressed in very similar statutory terms except that the latter refers to "guidance or supervision" rather than attention or supervision. The point is the same in both components. The issue is the nature and extent of the help reasonably required by the claimant on account of his disablement, provided it first fits the general statutory criteria for entitlement, compared with that of a child of the same age in normal health.

5. For example, with respect to lower rate mobility component, a claimant's disablement may give rise to a need for guidance or supervision which is of a type beyond that which is expected in relation to a normal child of the same age. Thus, although one would certainly have to accompany any ten-year-old in unfamiliar surroundings, it would usually be sufficient to walk beside a child in normal health simply as a companion and guide. If more is reasonably required by the claimant and is due to his disablement, then the question is whether this is substantially in excess of what could be expected in relation to a normal child of the same age and is required for most of the time. This is a matter of judgement for a

tribunal. However, as with all matters of judgement, it must be based on sufficient underpinning findings of primary fact.

6. For entitlement to the lower rate mobility component, ability to use familiar routes is to be ignored, but not an inability to use such routes if it derives from the claimant's physical or mental disability and fits the additional criteria applicable to children. In CDLA/42/94 the Commissioner said that supervision meant "monitoring the claimant or the circumstances for signs of a need to intervene so as to prevent the claimant's ability to take advantage of the faculty of walking being compromised", and pointed out that such action, if established, is not precluded from being supervision because the claimant derives reassurance from the presence of another.

7. The tribunal erred in emphasising that most "eleven year olds" (but in fact he was ten years old at the date of the adverse decision under appeal, which the tribunal has overlooked) are hardly ever on unfamiliar routes without an adult present. The tribunal is almost certainly right that any eleven year old on an unfamiliar route is at some risk. The critical question is therefore whether, when the claimant is out walking, on account of his disablement he requires extra guidance and supervision which is substantially in excess of those of other children of his age. His parents assert that he walks out in front of cars and has to be pulled back. That would not be a precaution ordinarily required for a ten year old child in normal health. What he does on familiar routes is evidentially relevant to what he might do on unfamiliar routes.

The starting point is the claimant on his own

8. The tribunal accepts that the claimant "presents handling difficulties because of his temper tantrums and need for attention" but appeared to decide against him so far as continual supervision is concerned because of lack of any evidence that any substantial danger had ever happened. However, the starting point is the claimant when on his own. What then are the risks? The help he actually receives is not determinative, although evidentially relevant, to the crucial question which is his reasonable requirement for supervision. But a claimant is not to be prejudiced when such help is provided and is what prevents or reduces the risk of danger so that it is less than substantial. The tribunal erred in too narrowly concentrating on whether circumstances had ever developed to produce actual substantial danger, without considering whether they would have done so had support not been there.

Where the medical member of the tribunal also acts as an examining medical practitioner (EMP)

9. On the appellant's behalf, the representative contends that the presence of an EMP on the tribunal compromised the appearance of the independence of the tribunal. The hearing was a paper hearing which prevented the opportunity for the appellant to ask for an adjournment in these circumstances.

10. There is no error of law in the tribunal decision. The decision of the Tribunal of Commissioners in CSDLA/1019/99 is under appeal to the Court of Session. But the circumstances which arose in the present appeal are quite different from those which arose in the Gillies case, although its rationale appears to be imperfectly understood, as here.

11. After an exhaustive consideration of the contractual arrangements for EMPs, the Tribunal of Commissioners concluded that such arrangements ensured the independence of EMPs. However, (see paragraph 77 of CSDLA/1019/99):-

"... placing ourselves in the position of the objective bystander, we consider that for one of these same doctors to be involved in assessing such reports prepared by other doctors and then adjudicating in conflicts of evidence between such reports and other evidence causes reasonable apprehension of at least a subconscious bias. Accordingly, and whatever our own judicial view, we think it would be reasonable for an informed member of the public to think that justice may not be done in such circumstances."

12. What was struck down in the Gillies case, was a situation where a medical member sitting on a tribunal is also an EMP and where the report of another EMP was part of the evidence in the case. As the Tribunal said, what raises objective bias is the concern that an EMP member of a tribunal (see paragraph 80 of CSDLA1019/99):-

"...because of the substantial current involvement in the same role as the reporting doctor, may start with an inclination to accept that evidence rather than objectively viewing the competing version."

13. The Tribunal of Commissioners gave no support to an argument that EMPs are intrinsically not independent of the Department. The Tribunal did not therefore suggest that the mere presence on a tribunal of an EMP as a member compromised the appearance of the independence of a tribunal. I disagree with what is said at page 732 of Volume III of the Social Security Legislation 2002:-

"The decision of the Tribunal of Commissioners is that the presence on an appeal tribunal of a medical member of a disability appeal tribunal who regularly undertook work as an examining medical practitioner could give rise to a reasonable apprehension of bias on the part of an objective third party. That would taint the independence and impartiality of a tribunal on which that medical member sat."

14. In this appeal, there was no report by an EMP for consideration by the tribunal. Therefore, the presence on the tribunal of an EMP and the fact that, because this was a paper hearing the point could not be put to the claimant, is irrelevant. No issue arose of the member starting off with a prejudice in favour of any particular type of evidence which was before the tribunal.

Summary

15. Subject to further action by the Secretary of State, the appeal is 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 the determination of the claimant's case on the merits is entirely for them. Although the claimant has been successful in the appeal limited to issues of law, the decision on the facts in his case remains open.

(Signed)
L T PARKER

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Commissioner
Date: 26 March 2003