

SOCIAL SECURITY AND CHILD SUPPORT COMMISSIONERS

Commissioner's File No.: C2/01-02(CRS)

Starred Decision No: 137/01

Commissioners' decisions are identified by case references only, to preserve the privacy of individual claimants and other parties.

Starring denotes only that the case is considered to be of general interest or importance. It does not confer any additional status over an unstarred decision.

Reported decisions in the official series published by DSS are generally to be followed in preference to others, as selection for reporting implies that a decision carries the assent of at least a majority of Commissioners in Great Britain or in Northern Ireland as the case may be. Northern Ireland Commissioners' decisions are published by The Stationary Office as a separate series.

*The practice about official reporting of Commissioners' decisions in **Great Britain** is explained in reported case R(I) 12/75 and a Practice Memorandum issued by the Chief Commissioner on 31 March 1987. The Chief Commissioner selects decisions for reporting after consultation with Commissioners. As noted in the memorandum there is also a general standing invitation to comment on the report-worthiness of any decision, whether or not starred for general circulation. However, a decision will not be selected for reporting if it is known that there is an appeal pending against it. The practice in **Northern Ireland** is similar, decisions being selected for reporting by the Northern Ireland Chief Commissioner.*

Any **comments** by interested organisations or individuals on the suitability of this decision for reporting should be sent to:

*Ms Kimberli Jones,
Office of the Social Security and Child Support Commissioners,
5th Floor, Newspaper House, 8-16 Great New Street, London EC4A 3BN.*

so as to arrive by 6th March 2002

Comments on Northern Ireland Commissioners' decisions will be forwarded to the Northern Ireland Chief Commissioner.

NORTHERN IRELAND HOUSING EXECUTIVE – COMPENSATOR

SOCIAL SECURITY ADMINISTRATION (NORTHERN IRELAND) ACT 1992

SOCIAL SECURITY (NORTHERN IRELAND) ORDER 1998

COMPENSATION RECOVERY SCHEME

Appeal to a Social Security Commissioner
On a question of law from a Tribunal's decision
Dated 27 April 1999

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. This is an appeal by the compensator, leave having been granted by myself, against a Tribunal decision dated 27th April 1999. The Tribunal's decision concerned an appeal by the compensator against a certificate of recoverable benefit. That certificate included benefit paid by way of Disability Living Allowance from 19th October 1994 to 8th May 1998.
2. The Tribunal decision was to the effect that the certificate of recoverable benefits was correct as to rates, periods etc and did not take into account listed benefits paid otherwise than in respect of the accident on 12th July 1994.
3. The Tribunal decision included sections headed "Findings of fact material to the Decision" and Reasons for the Decision". I set out below the findings of fact and reasons for the decision as recorded by the Tribunal:-

**"Findings of Fact Material to the Decision
(Specify the loss of faculty and the disabilities arising from loss of faculty)**

Her accident was on 12.7.94. She satisfied the qualifying period for Disability Living Allowance in October 1994. No benefits were claimed prior to the accident in July 1994. She claimed Disability Living Allowance due to her broken leg, with General Practitioner support. She had needed help with getting around since 12.7.94. Examining Medical Practitioner May 1995 accepted her walking had not improved. Disability Living Allowance was paid in consequence of the relevant accident. Mr Adair did not deny the leg was sub-standard or that discomfort was reasonably to be expected from tissue to time or that it would remain sub-standard in the future and that there had been considerable soft tissue damage as well. We do not accept she was better by April 1996.

Reasons for the Decision (including legislation and Commissioners Decisions considered by the Tribunal):

Her claim for Disability Living Allowance is reasonably attributable to the accident and the benefit has been properly recouped.”

4. In proceedings before me the compensator has throughout been represented by Mrs Anderson, Solicitor, of its Legal Department and the Department by the Decision Making and Appeals Unit (initially by Mrs Hall and later by Mr Gough). I am obliged to the representatives for their considerable assistance in this case.
5. I held a hearing of the appeal and at that hearing both representatives amplified the submissions which they had made in written correspondence.
6. Mrs Anderson’s grounds of appeal were as follows:-
 1. The Tribunal had failed to state adequate reasons for its decision. The decision did not give sufficient details to enable the appellant to ascertain which facts were accepted and rejected and the reasons for same.
 2. The Tribunal had failed to make adequate findings of fact. In particular the Tribunal had failed to make finding of fact in relation to the inconsistencies in the evidence. The findings of fact in the particular case were, in Mrs Anderson’s submission, unclear in that the Tribunal had not explained that there were two separate lines of arguments one in connection with the initial application for Disability Living Allowance and the second in connection with the renewal.
 3. Failure to apply the law.
In Mrs Anderson’s submission the Tribunal gave no indication of how the law had been applied to the facts in a particular case. The Tribunal had been referred to specific case law and its views on the weight to be attached to that case law were not included in the decision.
 4. The Tribunal decision was wrong in law in that the Tribunal failed to address the correct legal issue, namely whether the benefit was correctly paid after April 1996. The Tribunal decision did not take into account the evidence as a whole in the case. If the Tribunal had taken into account the evidence as a whole it could not have come to the determination which it did in this case.
7. The appeal was opposed by the Department. In relation to the first ground Mr Gough submitted that the Tribunal’s role in the matter was to consider the matter under article 14(2)(b) of the Social Security (Recovery of Benefits) (Northern Ireland) Order 1997 as it was at the time in question. At the time in question that provision indicated that a Medical Appeal Tribunal had, upon reference by the Department (which had been made in this case) to decide under aforementioned sub-section:-

“Whether listed benefits which have been, or are likely to be, paid otherwise than in respect of the accident, injury or disease in question have been brought into account.”

Mr Gough submitted that there was no reference or question arising about the matters covered in article 14(2)(a).

8. Mr Gough submitted that it was clear from the reasons for the decision that the Tribunal was addressing its mind to article 14(2)(b).
9. As regards the second ground of appeal (failure to provide adequate findings of fact) Mr Gough referred to decision *C28/00-01(IB)(T)* where a Tribunal of Commissioners in Northern Ireland had set out a Tribunal's duty as regards recording findings of fact. He submitted that the Tribunal in this case had clearly indicated that it accepted the evidence of the injured person's General Practitioner and of the Examining Medical Practitioner. It had also clearly dealt with the evidence of the compensator.
10. Referring to the decision of the Court of Appeal in Northern Ireland in the case of:-

Eagle Star Insurance v Department for Social Development

Mr Gough submitted that the Court had decided that the Tribunal must reach its own decision, having given such weight as it thought fit to the information (if any) presented to it by the Department and by the compensator. Mr Gough submitted that the Tribunal in this case acted in accordance with the decision of the Court.

11. As regards the third ground – that the Tribunal failed to apply the law, Mr Gough submitted that, in accordance with the decision of the former Northern Ireland Chief Commissioner in *R1/88(SB)* there was no obligation on a Tribunal Chairman to comment on or refer to every Commissioners decision cited at hearing. The important matter (as the Chief Commissioner stated in paragraph 7 of his decision) was to ensure that where there was a binding authority the legal principle laid down had been followed.
12. In any event, in Mr Gough's submission, the comments which I had made in decision *C6/99(CRS)* which was overturned by the Court of Appeal in the *Eagle Star* case on the case of Donnelly were still relevant, the Court of Appeal in the *Eagle Star* case not having addressed the decision in the Donnelly case. Those comments were to the effect that the judge in the Donnelly case was separating the perceived fairness of the recovery of benefit legislation from the principle of *restitutio in integrum* on which the judge would award damages. The decision in Donnelly was made under the formerly applicable legislation.
13. As regards the final ground of appeal – that the decision was wrong in law Mr Gough was of the view that the Tribunal had correctly addressed the correct issues under article 14(2)(b).
14. In her further submission Mrs Anderson amplified her earlier arguments, setting out that the Tribunal had not adequately explored the issue raised in the case that certain benefits ought not to have been paid at all. If that was so then they could not be said to be paid in respect of the relevant accident, injury or disease. Mrs Anderson cited the *Eagle Star* case as supportive of the submission that the Tribunal should have gone behind the decisions awarding benefit and had not adequately done so. She put

forward some detail as to why she considered that the Tribunal should have concluded otherwise than it did referring to stated inconsistencies in the injured person's evidence and the weight of objective medical evidence and the fact that the low rate mobility award in 1997 was made due to the need for supervision outdoors because of "panic attacks" not because of the leg injury.

15. Mrs Anderson submitted relying on the case of:-

RUC v Sergeant A (NI reports [2000])

that an appellate Court could upset a Tribunal's factual findings if there was insufficient evidence to support them or they were perverse. She submitted that, in the particular circumstances of this case, given the degree of inconsistencies and the weight of objective medical evidence, no reasonable Tribunal could have reached the decision which the MAT arrived at on 29th April 1995.

16. At hearing the submissions were further amplified but the essence of them is set out above.
17. I am of the view that the Tribunal did err in law in that it did not adequately deal with certain issues raised to it by Mrs Anderson. It is apparent from reading the record of proceedings that Mrs Anderson was raising to the Tribunal issues to whether Disability Living Allowance was properly paid at all as well as whether it was properly paid in respect of the accident or injury in question. The Tribunal's findings of fact and reasons would give some indication that it has dealt with whether or not the benefit was paid otherwise in respect of the injury. Its conclusions on Mr Adair's report would indicate that it was addressing that matter. Even accepting that Mr Adair's reports were adequately dealt with (which I do here for purposes of hypothesis only) it does not appear to me that the Tribunal dealt adequately with the issue raised by Mrs Anderson as to whether the panic attacks (which appear to have formed the basis of the award of low rate mobility component) were unconnected with the relevant injury. It therefore failed to deal adequately with the issue of whether or not the low rate mobility component was paid otherwise than in respect of the injury.
18. I also find that the Tribunal erred in not considering whether the benefit was properly paid throughout the period in dispute. Mrs Anderson's submissions to the Tribunal quite obviously raised this issue. The Tribunal has certainly found that the injured person's leg was not better by April 1996 and therefore by implication that indicated that she still suffered problems with it after that date but has not gone behind the decision to award benefit to determine whether the award was properly made. It therefore failed to deal with a relevant issue in the case. I remit the matter to a newly constituted Tribunal for re-hearing and direct that Tribunal to take account of the views expressed herein.
19. A Tribunal is obliged by the *Eagle Star* case to consider the issue of whether benefit was properly paid where this issue is raised to it.
20. In the *Eagle Star* case the Court of Appeal expressly stated that it did not wish to "tie the hands of" the Tribunal and it was for the Tribunal to give the weight which it saw fit to the evidence. The Tribunal is therefore entitled to make its own assessment of

evidence. Where the proper payment of a particular benefit for a particular period is in issue a Tribunal should consider all the relevant evidence before it, make its own assessment of that evidence and consider whether it could reasonably be said that the conditions for entitlement to the benefit in question were satisfied for the disputed period. It is not a matter of the Tribunal substituting its own decision to award the benefit, simply a matter of the Tribunal deciding on all the evidence now before it whether or not the award was reasonable. In those cases, hopefully few in number, where it could reasonably be said either that the conditions were or were not satisfied it cannot be said that benefit was not properly paid. If it could not reasonably be said that the conditions for entitlement to the benefit were satisfied then the benefit was not properly paid. Issues as to rates of benefit in relation to Disability Living Allowance may also be relevant.

21. I would wish to make comment on the case of *Donnelly v McCoy and another*, referred to by Mr Gough. Mr Gough is correct in that the Court of Appeal in the *Eagle Star* case did not refer to the *Donnelly* case. He is also correct in that I had referred to it in my decision. However, the judgment of Mr Justice Girvan in the *Donnelly* case was concerned with the application of the principle that a defendant must take a plaintiff as he found him to be and deciding that the perceived fairness or otherwise of the recoupment of benefit provisions had no impact on the restitution in integrum principle on which the assessment of damages is based. He was not concerned directly with the outworking or the interpretation of recoupment legislation, only with what, if any, loss of benefits could be claimed as damages. I do not therefore think that, in light of the *McClelland* decision, the *Donnelly* case can give great assistance to Tribunals or indeed Commissioners dealing with recovery of benefit.
22. For the reasons set out above the appeal is allowed, the decision of the Tribunal is set aside and the matter is remitted to a differently constituted Tribunal for re-hearing.

(Signed):

**MOYA F BROWN
COMMISSIONER**

(Dated):

24 OCTOBER 2001