DLA - Must consider entitlement to both components - claimant eligible before 65th birthday - Must consider speed etc. as well as distance

WMW/RA

Commissioner's File: CSDLA/19/94
*68/94

SOCIAL SECURITY ADMINISTRATION ACT 1992

APPEAL TO THE COMMISSIONER FROM A DECISION OF A DISABILITY APPEAL TRIBUNAL UPON A QUESTION OF LAW

DECISION OF SOCIAL SECURITY COMMISSIONER

Name: James Stark SANDILANDS

Disability Appeal Tribunal:

Case No: D/51/221/93/0159

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1. This claimant's appeal succeeds. I hold the tribunal decision dated 26 July 1993 to be erroneous in point of law and accordingly it is set aside. The case is referred to the tribunal for determination afresh in light of the guidance which follows.

2. In March 1992 the claimant submitted a completed claim form seeking an award of a disability living allowance. In the form he described difficulties that he had in regard to walking which indicated that he was seeking the mobility component of the allowance. He also gave a certain amount of material about help that he claimed to need during the day and, to a very limited extent, at night - despite ticking boxes therein indicative of "no help needed". I consider nonetheless that there was enough to indicate that the claim required some consideration in respect of the care component.

3. A claimant may be awarded an allowance with either or both of the care and mobility components - section 71(2) of the Social Security Contributions and Benefits Act 1992. If both components are awarded then the weekly rate of the allowance is the aggregate of the appropriate weekly rates for the components - section 71(5). The statutory conditions for the mobility component and the care component respectively are contained in section 73 and 72 of the Act. They have been adequately reproduced in the bundle within the adjudication officer's submission to the tribunal and I need not further rehearse them herein.

4. The claim was put before an adjudication officer who determined that the claimant was not entitled to an allowance. That inherently meant that each component had been considered and refused. The claimant then sought a review under section 30(1) of the Social Security Administration Act 1992. That provides that a decision of an adjudication officer "may be reviewed on any ground" if it had been made relative to "a disability living allowance". The former wording contains an echo of the attendance allowance statutory provisions whereby it was enacted, by section 106(1)(b) of the Social Security Act 1975, that a determination for or on behalf of the attendance allowance board could, within a prescribed period, be reviewed "on any ground". That was long settled to mean that the whole issue about attendance allowance was reinvestigated so far as necessary and entirely reconsidered save so far as the reviewing authority agreed with any award already made. In my judgment repeating the wording into the disability living allowance legislation means that the reviewing, or more properly the second-tier

adjudication, authority requires to look at the whole matter again in the same way. Indeed I note that the former attendance allowance board practice has become part of the statutory provisions in section 32 of the Administration Act whereby it is provided, at sub-sections (2), (3) and (4), that in so far as there has been an award second-tier adjudication need not consider that award. Thus it was that the material put before the tribunal by the adjudication officer in this case contained grounds, at paragraph 5 of documents 54 and 55, why the claimant had not satisfied the conditions for the mobility component and further, at paragraph 5A of document 55, why the claimant had not satisfied the conditions for the care component. However it is therein stated -

> "The review decision only considered the mobility component of disability living allowance this may be because the review application only mentioned mobility."

It is then explained why the care component had been disallowed at the original stage. But it does later say -

> "I do not consider that [the claimant] would require constant supervision to avoid danger to himself given the infrequent nature of his illness."

That dealt with one of the qualifications for the care component, where there is a risk of serious danger to health, and earlier there is an annotation, dealing with help during the day concluding that it was neither continuous nor for a significant portion of the day. It may therefore appear somewhat doubtful whether the reviewing authority had fully considered and redetermined the care component question. Whilst that is not a matter now before me, I may observe that in my judgment the second-tier adjudication was required to review both, however little the review request may have referred to the care component. There is a speciality in this case, also, in that the mobility component was at least in part related to the claimant's condition of epilepsy and that is notoriously a condition which *may* give rise to a need for care. It is not clear to me the extent to which it was so considered in this particular case.

5. It is the tribunal's decision, on appeal from the second-tier review that is my primary concern. I have to say in the first place that it is quite clear that the tribunal took considerable trouble to set out in full the evidence which was placed before them, and to make findings of fact and to explain their reasons for decision based upon those findings and application of the law. In the event they unanimously refused the appeal holding the claimant "not entitled to the mobility component of disability living allowance". The claimant has again appealed, with leave of the chairman. The adjudication officer now concerned submits that there is no point of law properly raised in any of the grounds of appeal or observations by the claimant and with that I have to agree. It is clear to me that the claimant has mounted this appeal upon the facts and merits and has not appreciated that it is only if there has been shown to be an error of law on the part of the tribunal that the Commissioner can interfere and even then in practical terms only to restore the case to the tribunal for consideration again. Nonetheless the adjudication officer now concerned makes submissions supportive of the appeal.

6. In the first place he submits that the tribunal's failure to deal with both components was an error of law. I accept and agree with that submission. I have already explained how the allowance is composed of the two components and the way in which reviews take place at second-tier adjudication. For the reasons already given, where an adjudication officer has made no award, second tier adjudication is bound to consider both components. Section 33 of the Administration Act provides for an appeal following such a review and that section provides, at

sub-section (1), that where an adjudication officer has given such a decision on a review a claimant -

> "... may appeal -
>
> (a) in prescribed cases to a disability appeal tribunal ..."

and at sub-section (3) it is provided that an award on an appeal replaces any award which was the subject of the appeal and there follow further provisions, at sub-sections (4), (5) and (6), that where there has been a positive award a tribunal "need not consider" either the entitlement to the component already awarded, or the rate thereof. Obviously, however, if a claimant disputed, for example, that he had been awarded too low a rate in an awarded component then he could appeal both the question of entitlement to the other component and the rate of the awarded component. In short, again the statute provides a method of appeal about the disability living allowance as such, only excluding therefrom, if the matter is not raised, a component or a rate already awarded. The corollary, to my mind, is that where no award is made both components must be considered, however briefly may be sufficient in a particular case. The fact that the statute provides for possible exclusion from consideration of parts of the allowance so far as awarded means that so far as not awarded all must be before them - it is perhaps a form of application of the maximum *expressio unius est exclusio alterius*. I find myself fortified in my conclusion by the very decision on file CSDLA/21/94.

7. The tribunal have further erred in law, in my judgment because the tenor of their findings and reasoning seem to indicate that they were determining his qualification as at or about the date of their hearing. The claimant was in fact 65 years of age very shortly after the date of his claim, namely in July 1992. Section 75(1) of the Contributions and Benefits Act provides that no-one is to be entitled to a disability living allowance for any period after he attains the age of 65 -

> "... other than by virtue of an award made before he attains that age."

Of course there could be no award by the tribunal, nor could there now be one, made before he attained the age of 65. There is a provision that regulations may otherwise provide. The Social Security (Disability Living Allowance) Regulations 1991, at regulation 3(3), provide that -

> "... where the person otherwise satisfies the conditions of entitlement to either or both components of disability living allowance for a period commencing before his 65th birthday [other than the requirements for a three months qualifying period] the determination shall be made without regard to the fact that he is aged 65 or over at the time the claim is determined."

There was a similar provision, in regard to attendance allowance. The result in my judgment, is that the tribunal were required to consider the claimant's condition in respect of either and indeed both components as at or before his 65th birthday in July 1992. It might be suggested that since they held that he did not qualify at the date of their decision all the less might he have qualified so much earlier. That may be so, or it may not be so. Conditions may fluctuate. The new tribunal will require to consider the matter as at and before the claimant's 65th birthday with a view to determining whether he satisfied the conditions for either, or it may be both, components - other than the three month qualifying period.

8. Finally, again accepting a submission made by the adjudication officer now concerned, I think it is correct that the tribunal when considering the mobility component did not deal with all the questions that they had to consider. They certainly dealt with the distance that the claimant could walk. They have not determined the other relevant questions posed by regulation 12(1)(a)(ii) of the Disability Living Allowance Regulations which require consideration, when determining virtual inability to walk. Thus a tribunal has to determine whether a claimant's physical condition as a whole is such that -

> "his ability to walk out of doors is so limited, as regards the distance over which the speed or the length of time for which or the manner in which he can make progress on foot without severe discomfort, that he is virtually unable to walk ..."

Relevant to this case, because they were mentioned in the papers before the tribunal, were speed, or it may be the time taken that was in question. The basic task for the new tribunal is to determine whether in endeavouring to walk the claimant ever comes to suffer "severe discomfort". But not just that. A person's progress on foot may be so limited by speed, or lack of it and so by length of time taken. that whilst he may be able to walk a distance before the onset of severe discomfort it takes him so long that really he is still "virtually unable to walk". It is simply because the old tribunal did not take account of and give their views about the issue of time and ~~agreed~~ speed that, had there been nothing else in the case, I would probably have had to sustain this appeal upon that matter as well.

(signed) W M WALKER
Commissioner
Date: 12July 1994