CPAG

DLA — Consideration of both components — DATs duty to record issues. Findings of fact

19/95

WMW/HJD/T/CH **Commissioner's File:** CSDLA/169/94

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:

Disability Appeal Tribunal: Glasgow

Case No: D/51/131/93/0351

[ORAL HEARING]

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1. This is an application for leave to appeal from the decision of a disability appeal tribunal dated 22 November 1993 which was put out for hearing. In the course thereof the merits were canvassed. With the agreement of both representatives and having indicated that I proposed to, and now do, grant the application, the hearing thereon was accepted as the hearing of the appeal itself.

2. This claimant's appeal fails. I hold the decision of the appeal tribunal dated 22 November 1993 not to contain an error in point of law such as to require my interference. The appeal is accordingly dismissed.

3. At the hearing the claimant was represented by Mr Chris Orr, a Welfare Rights Officer with Strathclyde Regional Council. The adjudication officer was represented by Mr William Neilson, Advocate, of the Office of the Solicitor in Scotland to the Department of Social Security. I am grateful to both for their assistance.

4. In July 1992 the claimant sought a disability living allowance (DLA) in respect of both the care and the mobility components. The decision by an adjudication officer on revisal found the claimant entitled to the care component, at the lowest rate, but not to the mobility component. The claimant's grounds of appeal to the tribunal brought into issue again both components. She sought a "higher" rate of the care component and some award in respect of the mobility component. Nonetheless, when the case first came before an appeal tribunal on 19 May 1993 the claimant, by her representative, intimated that the award of the lowest rate care component was not in dispute: only the mobility component was to be in issue. Evidence was accordingly limited. In the event the tribunal adjourned in order to obtain a medical report from a particular consultant as to what certain tests which he had had made had established about the claimant's walking ability.

5. The case next came before the tribunal with whose decision I am concerned. The consultant's report was put before them. So, too, was a report by the claimant's general practitioner. He had earlier provided a report when the appeal was lodged and indeed had completed "Statement 2" on the application form. That tribunal was then informed that the claimant -

".. was insisting only in the claim in respect of Mobility Allowance [sic]."

Again evidence, but more briefly, was limited to issues relevant to the mobility component. The tribunal gave this unanimous decision -

> "To uphold the decision of the Adjudication Officer and to hold that the appellant is entitled to the lower rate care component as from 01 07 92 to 30 06 94."

Their findings of fact were these -

> "Facts found by the Adjudication Officer:
> 1. [The claimant] can walk 150 yards without severe discomfort and stress. She can get in and out of bed, dress and undress and attend to her own toilet needs.
> 2. [The claimant] is unable to lift pans and is therefore entitled to the lowest rate of care component."

The reasons for decision dealt only with the mobility component issue. They were that -

> "The appellant sought the mobility component of Disability Living Allowance. The claim that she was unable to walk or virtually unable to do so. She did not insist on her higher rate care component. We accept [her general practitioner's] opinion that [the claimant] can walk 150 yards without severe discomfort or the stress [sic, probably "distress"], and without the help of another person. We note also the report from Mr McGill, Consultant Rheumatologist from Stobhill Hospital, that he could find nothing wrong with [the claimant]. At the tribunal she appeared to walk relatively freely without discomfort.
>
> In the circumstances we were not persuaded that [the claimant] was unable or virtually unable to walk, and we therefore required to refuse the claim."

The grounds of appeal submitted against that decision contended, first that there had been a failure by the tribunal to make their own findings of fact and, second, a failure to say why they rejected evidence given by the claimant. A third ground is that the tribunal had conducted a walking test without the permission of the claimant. I directed the hearing because I was concerned to hear argument on, first, the scope of the grounds of appeal as advanced and, second and related to it, whether the tribunal decision fell to be considered only in relation to the mobility component or whether there necessarily would be exposed to examination also the favourable award of a care component. In the event the second point gave rise, obliquely, to the major discussion which rendered it unnecessary to decide the point. I deal with that discussion first for that reason and also because it rapidly became clear that the grounds of appeal were intended to be limited to the decision only on the mobility component.

6. To set the scene it is next necessary to set out the law as it has thus far been developed. Section 71 of the Social Security Contributions and Benefits Act 1992 provides for a DLA and sub-section (1) prescribes that it is to consist of a care component and a mobility component. Sub-section (2) provides that an individual entitlement to the allowance may be to either or both of these components. There are then ancillary provisions. Section 72 provides the conditions for qualification for the care component and section 73 those in respect of the mobility component.

7. Section 30 of the Social Security Administration Act 1992 provides for reviews of DLA decisions by adjudication officers. The review in this case was under section 30(1) and so was an "on any ground" review. Only a review decision carries a right to appeal - section 33(1)(a) of the Administration Act.

8. It is next necessary to notice the somewhat cumbersome provisions which relate to each other successive decisions on the same application. Under section 32(1) an award of DLA on a review under section 30 replaces any award which was the subject of the review. But then sub-section (2) provides that where an award consisting of only one component is brought under review seeking the other component -

> ".. the adjudication officer *need not* consider the question of his entitlement to the component which he has already been awarded or the rate of that component." [My emphasis.]

There are further similar provisions dealing with the case where there is an award of both components and only the rate of one is in question and where a component has been awarded for life.

9. Section 33 of the Administration Act not only provides for the right of appeal to a disability appeal tribunal but goes on to say, at sub-section (3), -

> "An award on an appeal under this section replaces any award which was the subject of the appeal."

And then at sub-section (4) there is a provision that where an award consisting of one component is taken to appeal seeking the other component -

> ".. the tribunal *need not* consider the question of [the claimant's] entitlement to the component which he has already been awarded or the rate of that component."

Again there is provision in parallel to that dealing with adjudication officers' reviews limiting the need to consider rates already awarded if these are not themselves directly appealed.

10. Section 34 of the Administration Act provides for appeals from disability appeal tribunals to Commissioners. There are then no provisions in parallel to those limiting the need to consider favourable awards. But of course an appeal to a Commissioner, as section 34(1) makes clear, can only be upon the ground that the decision of the tribunal was erroneous in point of law.

11. Finally, it is necessary to bear in mind that in decision CDLA/21/94 the Commissioner emphasised the need for appeal tribunals to consider both components where there is material relating to one not mentioned in the claim form, or not raised before an adjudication officer. In decision CSDLA/19/94 I sought to agree with that view and went on to suggest that adjudication officers may need to consider a component not claimed in the form if there is before them, whether or not in the form, material suggestive of a possible entitlement to that other component.

12. Mr Orr submitted that the provision in section 33(4) of the Administration Act that the tribunal "need not" consider a component awarded gave rise to a discretion which had to be exercised on a judicial basis. That discretion, as I understood his argument, would only fall to be exercised where there was something of substance raised. In this case, from the facts and

reasons, it was clear that the tribunal had done very little independently in regard to the care component. Mr Orr went on to submit that the passages dealing with that component in both the findings of fact and the reasons did no more than endorse the finding of the adjudication officer. From that it would follow that the tribunal did not really deal with that branch of the case and so they had not given any independent consideration thereto or decision thereon. Had the tribunal been silent on the matter no problem would have arisen. That, he submitted, was virtually the position here.

13. Mr Neilson indicated that there was some general concern as to how tribunals should deal with such a case. He submitted that if there was evidence about a component other than that which was clearly intended as the sole subject of the appeal then a tribunal would err if they did not deal with it. He submitted that there were public interest grounds that a tribunal should give some indication of their views or findings and should not just ignore such evidence. In this case, in the note of evidence by the chairman of the first tribunal, at page 53 of the bundle, it was recorded that -

> "Claimant said one day she lifted a pot and had the sensation of an electric shock up her arm causing her to drop pot of boiling water. She has had one fall and was unable to rise unaided."

That, Mr Neilson submitted, was enough to call into consideration section 72(1)(a)(ii) of the Contributions and Benefits Act which provides one of the conditions leading to the lowest rate of the care component. The requirement therein is that an individual cannot prepare a cooked main meal for him or herself given that the ingredients are to hand. In short, said Mr Neilson, even where there was only a whisper about the unappealed component the tribunal were under a duty to consider it. Such consideration, I took it, would necessarily have to be full and if need be in exercise of the investigative part of the jurisdiction. He founded on paragraph 4 of DLA/21/94. What was raised before the tribunal in that case had not been mentioned in the claim form. It only arose in the evidence. That was to my mind a much clearer case and so to be distinguished on its facts. I take it that the corollary to Mr Neilson's submission was that if there was no whisper - that is if there was absolute silence about the awarded component - then, and perhaps only then, could the tribunal ignore it.

14. I think that a clue may be found in Mr Orr's rhetorical question as to which, in such cases, would be the operative decision for consideration in the event of further review. The answer to that, fortunately, is made quite clear in the statutory scheme. As already noted, if there is an award on a review by an adjudication officer then that becomes the operative decision and if the award is made by the tribunal then that is the operative decision - section 32(1) and section 33(3), respectively, of the Administration Act. That taken with the provision about "need not consider" seems to me to indicate that unless there is some reason for a tribunal to interfere with the award made below so far as not the express subject of appeal, their decision thereon will become the ruling decision so that any question of grounds for further review would have to be related to it and not to the decision below. That could be of considerable importance and seems therefore to require a tribunal who are going to deal with a matter which they "need not consider" but are to do so to deal fully with it. Were they simply to endorse an adjudication officer's review decision that could prejudice the future of the claim. Thus, a relevant change of circumstances since the adjudication officer's review could be denied as a ground for any future review, simply by the tribunal's endorsation coming later and being the operative decision.

15. These considerations persuade me that the question of considering, or not, a component already awarded is indeed dependent upon the exercise of some judicial discretion. That means that it would be requisite that something be shown, whether for or against the claimant, indicative that the review decision had been inadequate or in error. That in turn means that something of some substance on that component must come before the tribunal. A matter only possibly of substance would not do. In such a situation, moreover and in my opinion, the tribunal would require first to give notice of the matter and the basis upon which they were considering investigating that which had been already awarded.

16. In this case I have reached the conclusion that the tribunal did no more than receive a representation that the component was not in dispute. The only evidence that *may* have caused some doubt as to whether there was enough to warrant the award was only put before the earlier tribunal and not the one with which I am concerned. But even if it had been I would not be inclined to take the matter further. Otherwise the findings of fact, so far as tribunal may have made them, and their reasons, on the care component, including their decision, seem to me to have been but an unfortunate attempt to endorse the decision below. In my view a tribunal should maintain a total silence in their decision, findings and reasons about a component not in issue before them unless, as indicated above, they have a proper ground for giving into it.

17. I conclude finally that a tribunal decision which deals with both components will normally be looked at in respect of both by a Commissioner. Since there is no provision about "need not consider" when the case gets to that level I take the implication, based on the doctrine *expressio unius est exclusio alterius,* to be that the omnibus decision may be considered by the Commissioner. Since the discussion before me had led to a potential decision on the case this, the second point raised in my direction, did not seem to require further consideration. I should note that I have, without being directly addressed on the matter, held in other decisions that in such cases the decision on the other component can stand independently. There seemed to me to be some analogy with the rule in single payments cases or those concerning additional requirements under the former Supplementary Benefits Act 1976 and subordinate legislation. In all such cases only that question which was challenged was put under consideration; the remainder of the decision appealed stood, essentially as a decision upon a separate question. In DLA cases therefore something may turn on how the decision is couched. Care may be required, on that account, to keep components and rates separate from each other. However, since this point did not in the event require to be discussed, I have not come to a final view.

18. For the reasons earlier given I take the application for leave to appeal to be directed only against the implicit refusal by the tribunal to make any award in respect of the mobility component. I granted leave upon that basis and now turn to the merits of that appeal. The first ground advanced was that the tribunal's findings of fact were inadequate. Mr Orr submitted that the tribunal had really made no findings since they had simply repeated what had been found by the adjudication officer. It certainly appears from the opening words as if the tribunal were merely adopting the adjudication officer's findings and the two statedly independent facts which follow repeat, virtually word for word, part of what the adjudication officer had found. What the tribunal intended by their findings is not immediately clear. I must repeat what has so often been said before, that a tribunal should make its own independent findings upon the evidence as presented to it. That will usually be different from what was before the adjudication officer and, apart from anything else, independent findings demonstrate the tribunal's independence. If facts are non-contentious and both sides agree then it may be that such facts can be incorporated by reference to the adjudication officer's findings but then they should be clearly identified and the agreement by the parties recorded.

19. The proper consequence of the criticism contained in the previous paragraph is not so simple to determine. Because, for the reasons set out in the two following paragraphs, the tribunal in my judgment could properly only have reached a conclusion on the evidence against the claimant I am reluctant to hold that in the particular circumstances of this case that criticism amounts to such an error that requires me to interfere. Had I felt that it did, then for much the same reasons I could only have proceeded to make the findings for myself based upon the same state of the evidence and then given, at my own hand, the same decision as that reached by the tribunal.

20. The second ground of appeal is that the tribunal failed to say why they rejected evidence given by the claimant. Mr Orr pointed to what had been recorded in the note of evidence about the claimant's walking limitations. But the context indicates clearly that what was there set out was simply an *ex parte* statement by the claimant's representative. I must emphasise that such statements are not necessarily evidence even in the informal proceedings before tribunals. If a representative has some personal knowledge from which evidence could properly be given then that must be made clear and recorded. Otherwise there will tend to be an assumption that such material is merely a repeat of what has been gathered from another source, such as the claimant, who is not, for whatever reason, giving evidence to be tested by those otherwise involved in the case, including the members of the tribunal. Had the material here been evidence from the claimant then the note of evidence was inaccurate. I do not suggest that that was the position. Had it been so then I would have expected steps to have been taken first to have the record corrected.

21. In support of this second ground, Mr Orr pointed to other passages in the evidence and submitted that they disagreed with or contradicted what had been said for the claimant according to the chairman's note. I do not accept that. The other evidence, albeit in written form, consisted of the claimant's statement in the claim form that she could only take 3 to 4 steps before feeling severe discomfort. She did not give evidence to the tribunal, although present, and so that can rank no higher than the *ex parte* statement made on her behalf. The real evidence, from the medical authorities, was first, from her general practitioner, at document 42, that she could walk 150 yards without severe discomfort or distress. He gave a further statement in December 1992, document 51 of the bundle, saying that the claimant could -

> ".. only walk short distances."

Mr Orr founded much upon that as supporting for the claimant's account of 8 to 9 yards. I rather think that he had not appreciated that the distance of 150 yards stemmed from the same doctor who gave a further written statement dated 17 May 1993, document 58 of the bundle, in which he said that the claimant's -

> ".. mobility is quite naturally reduced and would support her claim to disability."

Again that may be so, but it in no way contradicts the earlier, and especially the particular, evidence already noted. Finally, there was the report by the consultant physician dated 23 August 1993, document 60 of the bundle. He could find no physical cause for the complaint that the claimant could not walk more than 8 or 9 yards. He accepted leg and arm pain but was unable to make any further diagnosis. I think therefore that the tribunal adequately explained why they found that the claimant could walk 150 yards without severe discomfort or distress, questions as to whether that was an independent finding apart. Indeed their reasons persuade me that upon that point at least they had made an independent finding. As noted, they had accepted

the general practitioner's opinion that the claimant could walk 150 yards and they noted the report from the consultant rheumatologist. (I think there was a mistyping, of no particular importance, in the tribunal reasons where they have misquoted the general practitioner's name). I reject the second ground of appeal.

22. The third ground of appeal was that the tribunal had effectively imposed a walking test when they brought into account, as recorded in the reasons, that the claimant appeared to walk relatively freely at the tribunal without discomfort. Mr Orr submitted that that offended against what was, for example, set out in paragraph 5 of decision CDLA/21/94 where the Commissioner said -

> "It is clear that when dealing with the mobility component the tribunal are unable to carry out a walking test in order to ascertain whether the claimant is suffering from physical disablement such that he is either unable to walk or virtually unable to do so. The tribunal are precluded from conducting a walking test or making a medical examination of the claimant."

However that seems to ignore what had just been said in the same paragraph under reference to section 55(2) of the Social Security Administration Act 1992. The prohibitions therein contained include that a tribunal -

> "(b) may not require the claimant to undergo any physical test for the purpose of determining whether he satisfies the condition mentioned in section 73(1)(a) of the Contributions and Benefits Act."

The key word is "require". There is no suggestion that this tribunal *required* the claimant to undergo any tests. They merely used what the Commissioner in CDLA/21/94 described as "ocular observation".

23. Mr Orr submitted that the Commissioner's conclusion that ocular observation was allowable as part of the tribunal's consideration was in error. His argument was based on a contention that any such observation would in some way amount to a "test". Even if it was so it was not a test that had been *required* and that is, as I understand it, the central reason why the Commissioner in CDLA/21/94 came to the view which he reached. On that matter I agree with my brother Commissioner and endorse the view that, whether it be a form of test or no, a disability appeal tribunal is quite entitled to use any material they have observed about the claimant within the tribunal room when coming to their decision. My only qualification would be that they must express what they observed in their findings or reasons and must take it within the context of the evidence as a whole bearing in mind both that they have seen the individual only for what amounts to a snapshot of his experience. They must also bear in mind such other factors as the circumstances of the hearing and the possible consequences thereof upon a claimant and any explanations such as fluctuations of ability spoken to in the evidence. I may add that I am far from convinced that any such observation amounts to any form of "test". I rather think that that concept involves having someone do something that they would at the time otherwise not be doing. Here the claimant was simply proceeding, voluntarily, into the room. To my mind a test must be set or delineated; nothing like of that was involved here.

24. Mr Orr also submitted that there could be an explanation for what a tribunal observed and that if observation alone was used a claimant would not be able to provide such and so be disadvantaged. However, that was in the context that the "test" might involve considering how

far the claimant would have walked before he got into the tribunal room. I do not think that what was recorded by this tribunal demonstrates that they were going so far. I would accept that if a tribunal were to make any assumption as to what a claimant might have done before he got into the tribunal room then that would be a matter which should have been exposed at the hearing for comment or explanation. I do not accept the third ground of appeal either.

25. Mr Neilson himself criticised the tribunal decision but did not seek to support either the second or third ground of appeal. His particular and separate point concerned the care component and a contention that there had been enough in the material before the tribunal to require them to consider it. He pointed to what had been before the earlier tribunal as recorded at document 53 of the bundle -

"She has had one fall and was unable to rise unaided."

That, he submitted, was evidence which should have been picked up by this tribunal and explored in order to be able to decide whether there had been involved a physical or mental disability and so to determine whether or not continual supervision might or might not be required within the terms of section 72(1)(b)(ii) of the Contributions and Benefits Act which contains one of the conditions for the middle rate of the care component. I reject that submission, on two grounds.

26. In the first place the context of the note of evidence indicates that what was said about the fall was an *ex parte* statement by the claimant's representative and so not really evidence. In the second place, the tribunal then concerned made no findings of fact because they were adjourning in order to allow there to be obtained a report from the consultant physician and rheumatologist. The tribunal with whose decision I am concerned was completely differently constituted. Regulation 26E(3) of the Social Security (Adjudication) Regulations 1986 required that the proceedings at their hearing were then to be by way of "a complete rehearing of the case". That is what happened and I am of the view that because of that provision the tribunal were entitled to ignore material so far orally tendered, and so far as it properly was evidence, before the earlier tribunal. I reserve my view as to whether, had there been findings of fact made arising out of that evidence, the later tribunal would have been entitled to ignore these and as to the extent to which, on the contrary, they might have had to take them into account.

(signed) W M Walker
Commissioner
Date: 15 March 1995

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WMW/HJD/T/CH **Commissioner's File:** CSDLA/169/94

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:

Disability Appeal Tribunal: Glasgow

Case No: D/51/131/93/0351

Correction Slip

Page 5, paragraph 16 last line -

delete giving insert going

(signed) W M Walker
Commissioner
Date: 23 March 1995