DECISION OF SOCIAL SECURITY COMMISSIONER

1. This claimant's appeal succeeds. I hold the decision of the Glasgow disability appeal tribunal dated 17 September 1997 to be erroneous in point of law and, accordingly, I set it aside. Because I think it appropriate to do so I myself give the decision which I consider that the tribunal should have given.

2. That decision is to endorse the decision of an adjudication officer dated 27 January 1996 which, upon a review under section 30(1) of the Social Security Adjudication Act 1992, refused to revise an earlier adjudication officer's decision in respect of the care component of disability living allowance. It expressly noted that there had then not been considered the award of the mobility component which was then in entitlement at the higher rate for life after conversion from mobility allowance. The practical effect of this decision, thus, is to restore that running award of the higher rate of the mobility component of the allowance from and after 17 September 1997 when it was terminated by the tribunal decision now before me.

3. This case was put out for oral hearing by my direction in order that I could have submissions upon the issues after discussed. At that hearing the claimant was represented by Mr Chris Orr, a Welfare Rights Officer with Glasgow City Council, and the adjudication officer was represented by Miss L Miller of the Office of the Solicitor in Scotland to the Department of Social Security. I am grateful for their assistance.

4. As noted, the tribunal whose decision is before me terminated the claimant's life award of the higher rate of the mobility component of the allowance. That seems to have been done almost without any proper thought. I can find no decision notice in the tribunal file. Their statement of material facts and reasons opens thus:-

> "The disability appeal tribunal for the appeal by [the claimant] was held on 17.9.97. This followed the withdrawal of an award of the higher rate of mobility component which had been awarded for life with effect from 6.4.92."

What follows seeks to justify that withdrawal as well as a determination that the claimant did not satisfy any of the criteria for any rate of the care component. That component is not now in question and so I need say no more about it. The tribunal statement ends with a confirmation that the claimant did not satisfy the conditions for an award of the mobility component. The material used to justify the tribunal's confirmation of a withdrawal as set out in the opening paragraph of the statement was based upon a report by an examining medical practitioner obtained in respect of both components of the allowance by order of an earlier tribunal held on 11 December 1996. The justification for that, at page 48 of papers, is that the appellant, who was present:-

> "....under all the circumstances....has indicated a deterioration. The appellant was here today with her representation [it was recorded by the Clerk that there was no representative] and did not appear to fully understand the implications. The appellant....did give information to us which gave us reasonable grounds for believing that entitlement to the mobility component ought not to continue."

It was upon that basis, that so far as that component was concerned, an EMP's report was requested.

5. The tribunal whose decision is before me appear to have proceeded upon the basis that the mobility component had already been reviewed and revised and so they were only considering an appeal against such a decision. That was a fundamental error and so a fundamental flaw in their decision. Next, they do not seem to have appreciated, at least so far as their statement reveals, that they were following the earlier tribunal's concern about the mobility component and that the evidence before them from the EMP had been obtained only because of that concern. Section 33 of the Social Security Administration Act 1992, which governs appeals following reviews under said section 30(1) provides at paragraph (6) that an appeal tribunal:-

> "...shall not consider -
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> (a) a person's entitlement to a component which has been awarded for life; or
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> (b) the rate of a component so awarded; or
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> (c) the period for which a component has been so awarded,
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> unless -
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> (i) the appeal expressly raises that question; or
>
> (ii) information is available to the tribunal which gives it reasonable grounds for believing that entitlement to the component, or entitlement to it at the rate awarded or for that period, ought not to continue."

The first tribunal clearly thought that they were proceeding under section 33(6)(ii). But there was nothing recorded to indicate precisely what it was that gave it reasonable grounds for its belief. That being so I directed the hearing upon the basis of the passage in Rowland "Medical and Disability Appeal Tribunals: the Legislation" 1998 Edition at page 118, that in such a situation where evidence is not sufficient to warrant interference with the protected award a tribunal may not adjourn in order to obtain such evidence. At the hearing before me it was accepted that that was the correct position in law. My direction also referred to the cases quoted in Rowland, namely decisions CSDLA/251/94 and CDLA/7082/95, wherein it was pointed out that such protected awards could only be reviewed if the information available to the tribunal gave it reasonable grounds for believing, in effect, that none of the different grounds for qualifying for the award. That also seemed to be accepted before me to be a sound statement of the law. I agree with these common positions. Accordingly, I hold that the first tribunal had had no authority to seek the evidence which was put before the second tribunal. The second tribunal erred in law; first by not confirming that the material put before them had been competently so put and, second, because, like the cases cited, only a general ability to walk seems to have been used as the basis for interfering with the protected award rather than all the grounds which include those to do with distance, time and manner of

walking. It was further common ground that as a basis for any proper review the tribunal would have had to look at the material available to and founded upon for the awarding decision before they could have entered upon the merits and determined which, if any, ground there was for a review under section 25(1) of the Administration Act.

6. The final matter with which I have to deal is the suggestion at the end of the submission lodged by the adjudication officer in response to my direction to the effect that because there had been intervening failed claims for the mobility component, which would be superseded by my award:-

> "...it would be open to the AO [Adjudication Officer] to look again at the life award, using any evidence that might have been obtained for those claims."

It was also noted that of course the Secretary of State might wish to consider interim suspension of benefit pending such a reconsideration by the adjudication officer. Somewhat at my instigation, in order to test the matter, Mr Orr submitted that the material obtained improperly by the first tribunal having been tainted by that impropriety could not be used now for a review. That, he suggested, rather followed views which I expressed in decisions CSDLA/121/97 and more strongly in CDLA/2375/97. I tend to the view, largely in order to prevent material improperly but deliberately obtained becoming admissible into a later stage of adjudication to the possible prejudice of, and the appearance of unfairness to, the claimant that that is correct. On the other hand I am not entirely clear, despite Mr Orr's best endeavours, upon a precise rule that could be expressed as sound in law either of procedure or competency or admissibility of evidence. Accordingly, I content myself with the stricture that that material for any future purpose in this case ought not to be used in order to avoid any indication of unfairness to the claimant.

7. There seemed to be no dispute, on the other hand, and I am satisfied that there could not be any objection of the sort I have just been contemplating, to the use of the material obtained on the two failed claims following the tribunal decision. It was again common ground that any review based thereon could not have an effect earlier than the date of the earlier such report. That, as I assume, is because the basis for the first tribunal's review appeared to be a relevant change of circumstances and that is probably the better basis for any review now to avoid, again, either any suggestion of unfairness to the claimant or, perhaps more importantly, getting into the difficult country where one doctor's view may not indicate an error or mistake as to fact but only a difference of opinion, or perhaps even of ability to record material provided.

8. Finally, and again in this case to avoid any suggestion of unfairness on the part of the adjudication authorities, I recommend that the relevant material be formally put before an adjudication officer by the Secretary of State, as indicated in the current version of said section 35(6) rather than, as the adjudication officer now concerned seems to be suggesting, that an adjudication officer should start the procedure at his own hand.

9. For the foregoing reasons this appeal must be allowed, the life-time award restored but subject to the further possible procedures indicated above.

(signed)
W M WALKER QC
Commissioner
Date: 2 August 1999