THE SOCIAL SECURITY COMMISSIONERS

Commissioner's Case No: CSDLA/362/98

SOCIAL SECURITY ADMINISTRATION ACT 1992

APPEAL FROM THE DISABILITY APPEAL TRIBUNAL UPON A QUESTION OF LAW

COMMISSIONER: W M WALKER QC

ORAL HEARING

Appellant:

Respondent: Adjudication Officer

Tribunal: Glasgow

Tribunal Case No: D/51/131/97/0374

DLA COMPONENT REMOVAL

i) need not not as powerful as 'shall not'

ii) where claimant had not sought review AO should notify claimant that they were about to review to allow chance to get further evidence

iii) importance of identify correct decision under review

iv) how can be on AO + claimant for different components.

AMBdla36298

DECISION OF SOCIAL SECURITY COMMISSIONER

1. This claimant's appeal succeeds. I hold the decision of the Glasgow disability appeal tribunal dated 5 August 1997 to be erroneous in point of law. Accordingly, I set it aside and refer the case to the tribunal for determination afresh in accordance with the directions below.

2. In November 1993 the claimant sought a disability living allowance. In light of the evidence before him an adjudication officer decided that the claimant was entitled to the middle rate care component, in respect of day needs, for life. In August 1994 the claimant sought a review and in respect of the evidence before him another adjudication officer reviewed the earlier decision upon the ground of a relevant change of circumstances intervening, namely that the claimant's care needs had increased. Accordingly, that adjudication officer revised the award by holding the claimant entitled to the highest rate of the care component for the period from 26 May 1994 to 25 May 1999.

3. In October 1995 the claimant sought a review in respect of mobility needs only. An adjudication officer, in light of the evidence thereon before him, concluded that there were no grounds to review the previous decision because none of the grounds set out in section 30(2) of the Social Security Administration Act 1992 had been made out. That, in effect, meant that in respect of mobility requirements he did not regard there as having been a relevant change of circumstances since the earlier decision. In July 1996 the claimant again requested a review - page 124 of papers. The stated ground was a deterioration in health and a need for the mobility component "(only)". In response the Department sent to the claimant form DLA 434 which she duly completed. That form contains questions designed to elicit evidence from people seeking only the mobility component of the allowance. The Department then sought from the claimant's general practitioner certain evidence. They posed questions as at page 141 of papers. The doctor's response is at page 142. Both questions and answers related solely to mobility issues.

4. According to the submission to the tribunal, the adjudication officer concerned then sought a report from a doctor of the Benefits Agency Medical Services (EMO). The form issued for that purpose, however, although it bore to be "DLA Specific" also sought evidence at large because it bore also to be concerned with "(Mobility and Care)" matters. In light of the response to that report the adjudication officer determined that the claimant's care needs had decreased and upon that basis reviewed the existing award under said section 30(2) and removed all entitlement to the care component. At the same time he found the tests for the mobility component not to be satisfied. Not surprisingly, the claimant sought a further review.

5. The further review was made under section 30(1) of the Administration Act and the adjudication officer conducting that review in effect agreed with the latest section 30(2) review. It was that decision, set out at pages 167 to 170 of papers that the claimant appealed to the tribunal. The tribunal adhered to the adjudication officer's decision. The claimant now appeals to the Commissioner, with leave of the chairman, upon a point of law.

6. The claimant's representative sought an oral hearing of the appeal and that request was granted by a Nominated Officer. Thus it was that the case came before me. At the hearing the claimant was represented by Mr Chris Orr, a Welfare Rights Officer with

Glasgow City Council. The adjudication officer was represented by Mr Stuart Bevan, Advocate, instructed by the Solicitor in Scotland to the Department of Social Security. I am grateful to both for their help.

7. Mr Orr's first questioned the competence of the adjudication officer's decision which had removed the care component award. He submitted that in so proceeding, without any advance notification to the claimant, he had been in breach of natural justice and the subsequent 30(1) review, and in turn the tribunal decision as I understood his point, were equally tainted and so in error of law. Mr Orr emphasised that it was the first reviewing adjudication officer who had widened the enquiry by using the "Mobility and Care" medical report forms. Until then the whole process had been limited to the request for review in respect of the mobility component. This issue had been raised and focused by a Nominated Officer in a direction dated 5 October 1998. Mr Orr appeared somewhat reluctant to make much of the claimant's application for a review at page 124 of papers. The Nominated Officer had drawn attention to section 30(7) of the Administration Act and it was upon the extent to which that application fulfilled the requirements of that section that Mr Orr appeared somewhat inconclusive. In my view, however, that document fulfilled the requirements of that sub-section and so was, as the Department had clearly treated it, the initiation of the section 30 procedure here. The ground for review thus set out was a deterioration in health and an increase of mobility requirements. The adjudication officer, without any prior notice to the claimant, had then concentrated upon the care needs which he held to "have decreased". Implicitly that was a decrease since the date of the decision which he was reviewing given in September 1994, some 2 years earlier.

8. Mr Orr's position requires consideration next of section 31(2) of the Administration Act. It provides that where there is an award of one component and there is an application for a review to award the other component then:-

> "....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."

Mr Orr noted that that mirrored a similar provision for appeal tribunals in section 33(5). He referred to Mr Commissioner Rowland's decision CDLA/15291/96 where, in similar circumstances, a question had been raised as to a possible breach of the rules of natural justice. Mr Commissioner Rowland said at paragraph 6:-

> "The adjudication officer argues that there was no breach of the rules of natural justice because the claimant had the opportunity of making representations and requesting a review of the decision after the first decision had been made, at which stage the medical examination had taken place, and then had the opportunity of appealing against the second adjudication officer's decision. That does not seem to me to be a complete answer to the point. It does not follow from the existence of a right to apply for a review and then to appeal that the initial decision was not made in breach of the rules of natural justice and the effects of such a breach cannot always be cured by the subsequent decisions.....Indeed, claimants are not usually provided with the relevant documents before a review....However, it has to be borne in mind that an adjudication officer is exercising an administrative function....In my view, an adjudication officer is not bound to offer every claimant the opportunity of commenting on all the

> available evidence....[but he].....has a duty properly to investigate a case before making a decision on it...."

Mr Orr took from that that there could be cases where what had preceded the decision in question was not rectifiable by subsequent rights of review and appeal. This case, he said, raised a question as to whether there could have been such rectification, or might have been if the adjudication officer had alerted the claimant to what he was investigating.

9. In the debate some reference was made to the former rules and practice about attendance allowance and the Attendance Allowance Board. It was certainly their practice when an examining medical practitioner (EMP) was considering removal of an existing entitlement that notice of that prospect was given to allow some response to the suggestion before the final decision was made. I am not aware that that was required by any form of legislation and take from R(A) 1/81 that it stemmed from the *audi alteram partem* rule. I refer also to the judgment of Lord Denning MR in R v Industrial Injuries Commissioner, Ex Parte Howarth (1968) 4 KAR 621 - Appendix to R(I) 14/68 ("Fourth: Natural Justice"). But I have reached the conclusion that that area of the law is not entirely in point upon this issue because from the Board's decision there was only a right of appeal and that only *on a point of law* direct to the Commissioner. In R(A) 1/81 it was held that such a breach of the rules of natural justice could not be cured by appeal to the Commissioner because of that limitation of scope. But in disability living allowance matters the appeal is to a tribunal who, for practical purposes, rehear the whole matter. I conclude, therefore, that whilst the adjudication officer's procedure was indeed contrary to the rules of natural justice that was not fatal to the tribunal. Despite the caution of Mr Commissioner Rowland, I am reasonably satisfied that such a rehearing will allow claimants to produce any evidence which they would have produced had an adjudication officer given proper notice. As it seems to me, the "need not consider" protection allows an adjudication officer to concentrate upon the unawarded component so long as there is nothing by way of evidence of substance tending to cast doubt upon the awarded component - paragraph 8(3) of decision CSDLA/180/94 by Mr Commissioner Mitchell QC.

10. In short, I consider the adjudication officer in this case should not have raised care component issues with the EMO. He should have used the "Mobility Only" enquiry form. He had no "need" to do otherwise. There was no prohibition against, or condition attached to, his widening the scope for his consideration as where there is a lifetime award - thus section 32(4) and 33(6) of the Administration Act. I consider that, having deliberately or inadvertently widened the scope, the adjudication officer should have deferred consideration of the care component until the claimant had been put on notice and had had an opportunity to comment. To that extent his procedure was flawed. The tribunal failed to note that. They should have done so and then enquired whether the claimant was in a position properly then to deal with the care issues.

11. The new tribunal will no doubt receive all evidence available upon any issue relevant to either component. They will note that they should determine matters down to the date of their hearing, unless any part of the Social Security Act 1998 has been brought into force to a contrary effect in which event the adjudication officer is to make a submission thereon for their guidance. The new tribunal will also be astute to note the projected ground of review and contrast it with the ground of review of the decision advanced for review. In order to

justify a decrease in care requirements since the awarding decision based upon an increased care requirement there will have to be before them evidence tending to show how the increase had been justified and how the present decrease from that situation wipes away any part, or all, of that increase. In that regard the initial onus in justifying his decisions will, I consider, be upon the adjudication officer. That is because the claimant is still only seeking a review in respect of the matters raised in regard to the mobility component as set out in document 124 of the papers. It is only in regard to that issue that the onus will be upon her.

12. Next, I should briefly consider a submission by Mr Orr that it was at the least doubtful whether the adjudication officer had had the power to request the medical material which he sought upon the care component. That sub-section 7(A) of section 30 was added to the legislation, empowering the Secretary of State to obtain material and put it before an adjudication officer, seemed to suggest, he submitted, that even the Secretary of State had not had such power. He pointed, correctly I suspect, to the linked amendment to section 32(4)(b) dealing with the condition precedent before an adjudication officer could open it up on a review. That amendment, which came into effect in July 1997, could not have affected the adjudication officer in this case and in any event the material obtained was said without dispute to have been at the instance of the adjudication officer. For my part, I have no doubt that the Secretary of State had the power to obtain that material. The provisions about his obtaining evidence and information and documents in connection with benefit claims and awards is quite wide - thus regulation 7 of the Social Security (Claims and Payments) Regulations 1987 and section 5(1)(h), (i) and others of the Social Security Administration Act 1992. There is, I conclude, nothing in this point.

13. Mr Bevan was at pains to resist any suggestion that a taint attaching to the adjudication officer's proceedings damaged also the tribunal's proceedings. I am satisfied that, unlike the life-time award position there is indeed no such taint. I take that from the decisions dealing with the life-time award such as CSDLA/120/97 where it is pointed out that the condition is mandatory - "shall not.....unless". Here, as was clearly contrasted in CSDLA/180/94, the provision is simply discretionary - "need not" without any "unless". But if an adjudication officer does widen the scope of the review then there are consequences of a procedural nature which I have set out above and which he will require, in fairness, to observe.

14. Next, Mr Orr invited me to consider the identify of the decision to be reviewed. He suggested that the only evidence of any change of circumstances was in the EMO's report. That could give rise to interesting consequences. However, I am satisfied, as indicated above, that document 124 was the trigger for a review. It follows, however, as Mr Orr also argued, that the tribunal decision was fundamentally in error of law for two other reasons. One, briefly, was that they had noted something about a recent deterioration but had failed to investigate it - the last paragraph of their findings and reasons on document 183A. But the major error was that they thought that the claimant's:-

> "....condition has been much the same for the last 3 years, although there may be some more rapid deterioration in the few months."

The first half of that, as Mr Orr argued, negates the ground of review founded upon by the adjudication officer. If that was truly the tribunal's finding then, without anything further,

they would have been obliged to allow the appeal and restore the award. But they do seem to have had regard to some of the evidence about the claimant's condition. The problem is that it then becomes unclear what, if any, decision, they were setting out to review and the claimant seems to have been given no clear notice thereof. If they were going to look at any other awarding decision then that might have been something more than a "new matter arising". The new tribunal may require in any similar event to consider carefully the provisions of section 36(1) of the Administration Act.

15. Two further matters should be dealt with. The first is, as Mr Orr submitted, that the new tribunal will require to give reasons why any, or as the case may be each, rate of the care component is being removed based upon findings of fact sufficient to support such a decision and based upon the evidence before them. More importantly, the tribunal will require to be astute to note the various complaints from which the claimant seems to have been suffering through the years in question and the extent to which these may have been continuous or not and overlapping or not. Moreover, the grounds upon which awards being reviewed were made will have to be carefully borne in mind and any "change of circumstances" or "error" specifically related thereto. Mr Orr pointed to various parts of the evidence which seem not to have been taken into account at later stages. How the case will be presented to the tribunal is not for me, but they may need to reconcile such material as that recorded at documents 14, 32, 45, 47 to 49, 142, 145 and 152 and 153 of the bundle. No doubt, however, the claimant's case will be fully presented and elaborated to the new tribunal.

16. For the foregoing reasons the tribunal decision cannot stand: the appeal must be reheard and the case is remitted accordingly.

(signed)
W M WALKER QC
Commissioner
Date: 12 March 1999