

WRB — NS

Bulletin 163 7

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SOCIAL SECURITY AND CHILD SUPPORT COMMISSIONERS

Commissioner's File No.: CSDLA/388/2000

Starred Decision No: 41/01

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

Mr Damien Abbott,
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 17th July 2001

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

DECISION OF SOCIAL SECURITY COMMISSIONER

1. The claimant's appeal, brought with leave of the Chairman, is allowed. The decision of the Glasgow disability appeal tribunal sitting on 8 March 1999 (the tribunal) is an error of law and I set it aside. I return the appeal to a freshly constituted tribunal for rehearing and redetermination in accordance with the guidance below.

Background

2. The claimant's date of birth is 8 February 1932. He therefore reached the age of 65 on 8 February 1997.

3. He claimed disability living allowance (DLA) on 15 April 1992 and was awarded highest rate care component DLA from and including that date. He was apparently in receipt of Mobility Allowance at that time but from when is not clear. However, since 8 May 1993 it seems there have been renewed awards of higher rate mobility component DLA. An adjudication officer (AO) on 2 December 1996 revised the then expiry date of 7 May 1997 for higher mobility DLA and decided that the claimant was entitled to the mobility component at that level from 8 May 1997 for life. In his 1992 DLA claim the claimant described his illnesses as "dermatitis and severe coronary".

4. As part of the Benefit Integrity Project the claimant was asked to complete a self-assessment questionnaire and this was returned by the claimant on 27 January 1998. A report was then obtained from an examining medical practitioner (EMP) which was dated 23 April 1998. Apart from a queried ability to peel and chop vegetables, because the EMP accepted that in the past the claimant experienced severe contact dermatitis, the EMP report suggested a much lower level of care and mobility needs than justified by the continuing award.

5. On 5 May 1998 the Secretary of State's representative applied for a review. The reason given for the application was that the medical evidence showed a change of circumstances. A day later, the AO reviewed the decision of the AO of 2 December 1996 on that basis.

6. On revisal the AO decided that the claimant was not entitled to any rate of either the care or mobility components of DLA from and including 23 April 1998. By letter received on 18 May 1998, the claimant asked for further review. On second tier review, conducted on 15 June 1998, the adverse decision was upheld. The claimant appealed on 20 July 1998.

7. He attended the hearing on 8 March 1999, accompanied by his representative, a local welfare rights officer (the representative). On his behalf, a letter from the general practitioner (GP) and one from a hospital dermatologist (the dermatologist) were lodged, both of which confirmed the claimant's chronic dermatitis. The GP also referred to his "Myo Infarction".

The tribunal decision

8. In its decision notice, the tribunal unanimously held the claimant to be entitled to an award of care component DLA at the lowest rate from 24 April 1998 for life but to nothing else.

9. In its statement of reasons, the tribunal decision was now given as an award of lowest rate attendance allowance (AA) from 24 April 1998 for life. At finding in fact 10, the tribunal found that the claimant "cannot prepare a cooked meal for himself because of the risk of flare-up of his skin condition".

10. In its reasons, the tribunal noted that it had considered the reports from the GP and the dermatologist. "The GP merely confirms the two conditions from which the appellant suffers. The dermatologist does not confirm an underlying problem with the appellant's feet."

Grounds for appeal

11. The claimant argues that the EMP report is inadequate because he disregarded the diagnoses of the dermatologist and the GP.

The Secretary of State's submission

12. The AO's functions have now been taken over by the Secretary of State. The Secretary of State supports the appeal but for other reasons than those suggested by the claimant.

13. The Secretary of State submits that it is clear that the tribunal was purporting to make an award of the lowest rate of the care component of DLA based on the cooking test. The Secretary of State refers to Schedule 1 (the schedule) of the Social Security (Disability Living Allowance) Regulations 1991 (the regulations), in particular paragraph 3(2)(b) of the schedule. It is submitted that the award made by the tribunal cannot be made to a person aged over 65.

14. The claimant, through his representative, has no further comment.

My conclusion and reasons

15. I accept that the decision is in error of law and I set it aside. However, I am unable wholly to accept the arguments of either party.

Medical Evidence

16. The tribunal is entitled to make up its own mind on the medical evidence, provided it demonstrates that all the evidence has been considered and explains any preference.

17. The EMP could not disregard the reports of the GP and the dermatologist because those reports were unavailable to him. Neither report is in fact inconsistent with that of the EMP. The tribunal has explained why, in its view, the new reports do not take his case any further forward than that endorsed by the EMP. I reject the claimant's grounds of appeal

Reviews of decisions

18. The then applicable legislation for review of a decision of an AO on DLA or AA was in the Social Security Administration Act 1992 (the Act). If it was a life award of DLA, as here, under section 32(4)(b) before even embarking on a review an AO had to have information giving reasonable grounds for believing that some element of the award ought

not to continue. The EMP report clearly provided such information and the decision of the AO on 6 May 1998 states that it was given under section 32(4) as well as section 30 of the Act.

19. Section 30 of the Act provided the mechanism for review of a decision of an AO by an AO. Unless an application was made within 3 months of the relevant decision, such a decision could be reviewed only if a head falling within section 30(2) was made out. An adjudication authority cannot move to revisal, unless initial review is correct. This was confirmed by the Court of Appeal in *Ashraf v Secretary of State for Social Security*, 2 December 1999.

20. The tribunal decision states only:-

“The AO did have grounds to review the previous awards of care and mobility components given the evidence before him.”

21. The tribunal's decision does not expressly show it considered the propriety under section 32(4) of the AO undertaking review or thereafter what head falling within section 30(2) was made out. Its explanation needed only to be brief, given its findings on his current condition, but should have been addressed and recognising that the burden of proof on all matters in review, and thereafter revisal, lay in this case on the AO. Additionally, the decisions under review required to be identified. The AO decision of 2 December 1996 explicitly did not consider the care component.

22. The care component for life was awarded by an AO decision of 16 November 1992. However, by virtue of regulation 13 of the Social Security (Introduction of Disability Living Allowance) Regulations 1991, his award of DLA care component and his separate award of higher rate mobility component from 8 May 1993 both terminated immediately before 27 December 1993 and were treated, as from 27 December 1993, as a grant of one award of DLA, consisting of both components for the period they had hitherto been awarded. The deemed grant from 27 December 1993 therefore required review with respect to care. This would be sufficient if the correct ground of review is relevant change of circumstances; if, however, it is ignorance or mistake of fact, then so far as care is concerned, that would have to bring under review the decision of 16 November 1992, and in relation to mobility, the earlier decisions applicable to that component.

23. The tribunal's approach to review has therefore been inadequate and its decision is for that reason in error of law and must be set aside.

The age criteria

24. Claims to DLA, either component, must now be made before the claimant is 65 (66 prior to 6 October 1997). Thereafter, claims to AA only are possible. The starting point is section 75(1) of the Social Security Contributions and Benefits Act 1992 (the Benefits Act), which lays down the general rule that no-one is entitled to DLA for any period after reaching 65 unless entitled under an award made before becoming 65. But regulations may provide otherwise. Regulation 3(4) of the regulations gives effect to the schedule.

25. The schedule deals with the determination of altered awards and renewal claims on or after a person's 65 birthday. Paragraphs 3, 5 and 6 of the schedule allow a person of or over

65 to remain entitled to lowest rate care or higher or lower rate mobility if previously so entitled. However, the claimant cannot usually qualify at that stage *for the first time* for the lowest rate care or higher or lower rate mobility. This is so even where the claimant previously received a higher rate in each case for which he or she no longer qualifies.

26. From 18 October 1999, the schedule was amended to accommodate the replacement of review by revision or supersession introduced by the Social Security Act 1998. The terms of review and revisal used in the former version of the schedule are now replaced by revision or supersession. But the overall effect of the schedule remains the same as that of its form in force at the time applicable to the claimant's case.

The schedule

27. The limiting effects of paragraphs 3, 5 and 6 of the schedule apply only to reviews (now revision or supersession) of awards made on or after the claimant's 65th birthday or of a prior award if the ground for review justifying an alteration of the award is a change in circumstances which occurred on or after the claimant's 65th birthday. For convenience, I set out paragraphs 1 and 2 of the schedule, as well as paragraphs 3, 5 and 6, as they read until 17 October 1999:-

“Review of an award made before person attained 65

1.-(1) This paragraph applies where-

- (a) a person is aged 65 or over;
- (b) the person has an award of disability living allowance made before he attained the age of 65;
- (c) an application in writing is made in accordance with [section 30(7) or 35(4) of the Administration Act] for that award to be reviewed; and
- (d) an adjudicating authority is satisfied that the decision awarding disability living allowance ought to be both reviewed and revised.

(2) Where paragraph (1) applies, the person to whom the award relates shall not, subject to paragraph (3), be precluded from entitlement to either component of disability living allowance solely by reason of the fact that he is aged 65 or over when the revised award is made.

(3) Where the adjudicating authority determining the application for review is satisfied that the decision ought to be reviewed on the ground that there has been a relevant change of circumstances since the decision was given, paragraph (2) shall apply only where the relevant change of circumstances occurred before the person attained the age of 65.

Reviews of an award other than a review to which paragraph 1 refers

2. References in the following paragraphs of this Schedule to a review of an award refer only to those reviews where the awards which are being reviewed were made-

- (a) on or after the date the person to whom the award relates attained the age of 65; or
- (b) before the person to whom the award relates attained the age of 65 where the award is reviewed and revised by reference to a change in the person's circumstances which occurred on or after the day he attained the age of 65.

Age 65 and over and entitled to the care component

- 3.-(1) This paragraph applies where a person on or after attaining the age of 65-
 - (a) is entitled to the care component and an adjudicating authority is satisfied that the decision awarding it ought to be revised on a review under [section 30, 31 or 35 of the Administration Act]; or
 - (b) makes a renewal claim for disability living allowance.
 - (2) Where a person was entitled on the previous award or on the award under review to the care component payable-
 - (a) at the lowest rate, that person shall not be precluded, solely by reason of the fact that he is aged 65 or over, from entitlement to the care component; or
 - (b) at the middle or highest rate, that person shall not be precluded, solely by reason of the fact that he has attained the age of 65, from entitlement to the care component payable at the middle or highest rate,
- but in determining that person's entitlement, [section 72] of the Act shall have effect as if in paragraph (a) of subsection (2) of that section for the reference to 3 months there was substituted a reference to 6 months and paragraph (b) of that subsection was omitted.
- (3) In this paragraph, a renewal claim is a claim made for a disability living allowance where the person making the claim had-
 - (a) within the period of 12 months immediately preceding the date the claim was made, been entitled under an earlier award to the care component or to attendance allowance (referred to in this paragraph as "the previous award"); and
 - (b) attained the age of 65 before that entitlement ended.

.....

Age 65 or over and entitled to mobility component

- 5.-(1) This paragraph applies where a person on or after attaining the age of 65 is entitled to the mobility component payable at the higher rate specified in regulation 4(2)(a), and-
 - (a) an adjudicating authority is satisfied that the decision giving effect to that entitlement ought to be revised on a review under [section 30, 31 or 35 of the Administration Act], or
 - (b) the person makes a renewal claim for disability living allowance.
- (2) A person to whom this paragraph applies shall be not precluded, solely by reason of the fact that he has attained the age of 65, from entitlement to the mobility component by virtue of having satisfied or being likely to satisfy one or other of the conditions mentioned in subsection (1)(a), (b) or (c) of [section 73] of the Act.
- (3) In this paragraph and paragraph 6 and 7 a renewal claim is a claim made for a disability living allowance where the person making the claim had-
 - (a) within the period of 12 months immediately preceding the date the claim was made been entitled under an earlier award to the mobility component (referred to in these paragraphs as "the previous award"); and
 - (b) attained the age of 65 before that entitlement ended.

Aged 65 or over and award of lower rate mobility component

- 6.-(1) This paragraph applies where a person on or after attaining the age of 65 is entitled to the mobility component payable at the lower rate specified in regulation 4(2) and-
- (a) an adjudicating authority is satisfied that the decision giving effect to that entitlement ought to be revised on a review under [section 30,31 or 35 of the Administration Act], or
 - (b) the person makes a renewal claim for disability living allowance.
- (2) A person to whom this paragraph applies shall not be precluded, solely by reason of the fact that he has attained the age of 65, from entitlement to the mobility component, but in determining the person's entitlement to that component [section 73] (11) of the Act shall have effect in this case as if paragraph (a), and the words "in any other case" in paragraph (b), were omitted."

The effect of the schedule

28. Paragraph 1 is crucial. Review and revisal (and now revision or supersession) of an award once the claimant has reached 65 may not preclude entitlement to DLA solely by reason of age. But the award so altered *must* have been made before the claimant became 65. Also, where the ground of review is relevant change of circumstances, it depends when that change occurred. Under paragraph 2(b) of the schedule, if the change in the person's circumstances occurred *on or after* his 65th birthday, then the later restrictions of paragraphs 3, 5 and 6 bite. However, under paragraph 1(3), if the review and revisal is on the basis of a change of circumstances which occurred *before* the claimant's 65th birthday, there are no barriers.

29. Therefore, a claimant who was receiving a DLA award before he was 65 but on or after reaching that age, it is appreciated that the level of award was wrong for all or part of the period before the 65th birthday, is not prevented from now receiving the level which is correct. This is so, even though payment may begin only after the claimant reaches 65, at a level which is not otherwise permitted to start at that age. Reviews based on error of law or on ignorance or mistake of fact are not excepted from the benefit of paragraph 1 of the schedule. They fit within its rationale because the mistake relates to the original decision on the award which *ex hypothesi* was made before the claimant reached 65.

30. There are differences, not yet fully explored, between the former review and revisal, and the current alternatives of revision or supersession with respect to their operation on prior entitlement as distinct from payment of arrears. However, any such differences do not seem to impact on the effect of paragraphs 1 and 2 of the schedule. Even if supersession affects entitlement only from the day it is made (whereas the limits on review and revisal relate to the backdating of payment), the ambit of the schedule remains unaltered. This must be so because the only changes to paragraph 1 (3) of the schedule from 18 October 1999 are to delete the words "for review", and substitute the word "superseded" for "reviewed". The focus remains therefore on the requirement that the event triggering the alteration is before the claimant reached 65 rather than on when the altered award may begin.

An award of DLA made before the claimant attained the age of 65

31. The decision of the AO of 2 December 1996 (before the claimant's 65th birthday on 8 February 1997) purported to hold him entitled to the mobility component of DLA at the

higher rate "from and including 8 May 1997 for life". Does the claimant satisfy paragraph 1(1)(b) of the schedule, "the person has an award of disability living allowance made before he attained the age of 65"?

32. If the decision had been in response to a renewal claim for both mobility and care component, each due to expire at the end of the same fixed period, then probably the subsequent award would have been made after the claimant reached the age of 65. Regulation 13(C) of the Social Security (Claims and Payments) Regulations 1987 allows a continuation claim for DLA to be made during the last six months of an existing award. The adjudicating authority may then treat the claim as if made on the first day after the expiry of the existing award and award benefit accordingly. In such circumstances, an award can hardly be earlier than when the claim for it is treated as made.

33. However, I do not have to decide this point. Under section 71 of the Benefits Act, there are two components to DLA and a person may be entitled to one or the other or to both. This claimant undoubtedly had an award of the care component of DLA made before he attained the age of 65 which it was sought to review by the application on 5 May 1998 made in accordance with section 30 (7) of the Act. Moreover, although the decision of 2 December 1996 purported to operate only from 8 May 1997, which was after the claimant's 65th birthday, in substance it was not a decision on a renewal claim, effective only from the end of the existing award, it was a review and revisal decision. Under section 30(12) of the Act, if there are grounds for review, then a renewal application may be treated as an application for review.

34. The continuing DLA award had to be reviewed and revised to accommodate the altered duration of the mobility component. Whenever the decision was made, and whenever the expiry of mobility would otherwise have been, cannot undermine its status as one running award. "The same train with different wagons" is how it was once memorably described. (The situation may be different with supersession, as this apparently terminates the prior award from its effective date. It may then be crucial whether "made" is date decision to supersede is carried out or date from which it takes effect.

The inquisitorial role

35. For the sake of convenience, the AO reviewed and revised from the date of the EMP report, which was couched in extremely negative terms so far as the claimant's entitlement was concerned, in respect of all matters except cooking. The AO's ground of review was relevant change of circumstances. But there is nothing to suggest that the facts founding the EMP opinion first applied (if at all) only from the date of the examination. The EMP was of the opinion that the claimant's needs had existed since 1991. To the tribunal the claimant said that the last of four heart attacks was in 1993. Given the claimant's statements on 18 February 1992, it is unclear why the AO then awarded highest rate care. No information has been lodged by the AO, as it should have been, with respect to the mobility award prior to the claim received 22 November 1996.

36. The tribunal is an inquisitorial body. Its object is to ascertain the true facts and reach the right result. If the new tribunal finds that the decision awarding care or mobility was made in ignorance or mistake of primary fact or that from a date prior to his 65th birthday, the claimant's circumstances had improved and that, in either case, he was no longer entitled to his existing award but was entitled to either or both of the lowest rate care and lower rate

mobility DLA, then review can be carried out and revisal of the award made to begin from the proper date. In his first claim for DLA of 15 April 1992, the claimant said that "I am unable to prepare meals for myself and wash up utensils" (see page 21 of the bundle). In his self-assessment questionnaire signed 27 January 1998, the claimant said that he "needed someone with me as I can't breath [sic] in the cold weather" (see page 75 of the documents). The latter statement dates from after his 65th birthday but may reflect an earlier situation and there may, moreover, be similar sentiments expressed in prior mobility applications. He describes being very breathless in the 1996 claim but did not complete the part designed to elicit a need for someone with him when walking out of doors.

37. Limitations on backdating, and offset for any arrears against the higher payments already made, mean that any satisfaction of the criteria for lowest rate care and lower rate mobility, if found correct from prior to the 65th birthday instead of the actual award entitlement, is academic before the date of the decision under appeal. But payment from then under the lower rates is legally possible, and even under the new system of revision and supersession.

38. I therefore agree with the Secretary of State that the tribunal's decision is in error of law in failing to consider how the schedule applies to the circumstances of the claimant's case. I do not, however, agree with the suggestion that the claimant's age necessarily prevents an award of lowest rate care.

Directions to the new tribunal

39. The appeal is referred to a differently constituted appeal tribunal for determination in accordance with the following directions:-

- (a) The review provisions of the Act were repealed from 18 October 1999, when the Social Security and Child Support (Decisions and Appeals) Regulations 1999 came into force for the purposes of DLA. Although from the same date the new system of revision and supersession replaces review, the new tribunal applies the formal legal provisions because they were the ones applicable and available to the AO on 5 May 1998 when the application for review was made.
- (c) The tribunal will apply section 32(4) and section 30(2) of the Act to determine whether there is a ground to review the award of DLA and which decisions.
- (d) If relying on ignorance or mistake of fact to justify review, then the tribunal must identify the primary fact of which the relevant decision maker was ignorant or mistaken. If relying on relevant change of circumstances, the tribunal must make adequate findings of fact as to what is the relevant change and from when it dates. If there is no ground to review, then the tribunal does not proceed to revisal. If there is ground to review, then on revisal the tribunal similarly makes findings of fact on the issues relevant to entitlement. Given the date when the appeal was lodged with the tribunal, matters are not taken beyond 15 June 1998.
- (e) The new tribunal will consider if the provisions of the schedule in its form prior to 18 October 1999 apply to the circumstances of this claimant.

- (f) As the Secretary of State seeks review, the burden on all matters relating to removal of the current award lies on him. This must include, if the tribunal is satisfied that the award should be reviewed and revised from a date prior to the claimant's 65th birthday, negating entitlement to lowest rate care or lower rate mobility at the date of the event which triggers the former review and revisal and now revision or supersession. In principle, if some part of the award remains following that exercise, there is no reason why a later relevant change of circumstance may not also be taken into account, albeit to a rate not usually available for the first time once 65, provided the change occurred before the claimant attains the age of 65. The burden of proof would then shift to the claimant if such a change produces a level of entitlement favourable to him.

Summary

40. For the foregoing reasons the appeal of the claimant is allowed. It is emphasised that there will be a complete rehearing on the basis of the evidence and arguments available to the new tribunal. My jurisdiction is limited to issues of law so my decision is no indication of the likely outcome of the rehearing.

(signed)
L T PARKER
Commissioner
Date: 5 March 2001