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THE SOCIAL SECURITY COMMISSIONERS

Commissioner's Case No: CSDLA/430/04

SOCIAL SECURITY ACT 1998

APPEAL FROM THE APPEAL TRIBUNAL UPON A QUESTION OF LAW

COMMISSIONER: L T PARKER

Appellant:

Respondent: Secretary of State

Tribunal: Glasgow

Tribunal Case No: U/05/100/2004/00021

DECISION OF SOCIAL SECURITY COMMISSIONER

1. The decision of the Glasgow appeal tribunal (the tribunal) held on 16 April 2004 is wrong in law. I therefore set it aside and remit the case for rehearing by a new tribunal.

Errors of law

The cooking test

2. It is not a simple issue of whether the claimant has the physical ability to perform all the activities in connection with above test but it is relevant whether, through disablement, he lacks the concentration to do so on a regular basis.

3. The tribunal found as fact that the claimant has asthma and anxiety. It rejected the appellant's oral evidence that it was his asthma which prevented him cooking. However, it did not address the argument put in issue by the production of a letter from the general practitioner (GP) dated 18 February 2004 in which the GP said:

“Due to chronic anxiety he can at times have problems concentrating and cooking a meal and should not be using a cooker or carrying hot pans in my opinion.”

4. The tribunal is not obliged to accept what the GP states nor what the appellant himself states, but it has a duty to assess all of the evidence, reach a reasoned view of which it prefers and why, and briefly to explain to the appellant the process by which it has analysed the evidence in the way it has when applying the statutory tests. The tribunal erred in law in this respect in failing to deal with the case put that the appellant's asserted problem with concentration would affect the cooking of a main meal. Whether it does, and to a sufficient degree, is now a matter for the new tribunal.

Mobility component of disability living allowance at the lower rate (lower mobility)

5. The crux of entitlement to lower mobility is whether guidance and supervision would overcome the effects of a claimant's physical or mental disablement and enable him to walk out of doors, perhaps on both familiar and unfamiliar routes but at least on unfamiliar ones. However, an extra complication arises where it is accepted that, as here, a person cannot go out without the appropriate help because of chronic anxiety about sustaining an asthma attack.

6. As noted by Mr Commissioner Henty in CDLA/2164/03, new statutory provisions came into force on 8 April 2002, i.e. regulation 12(7) and (8) of the Social Security (Disability Living Allowance) Regulations 1991 (the 1991 regulations). These paragraphs provide:-

“(7) For the purposes of section 73(1)(d) of the Act, a person who is able to walk is to be taken not to satisfy the condition of being so severely disabled physically or mentally that he cannot take advantage of the faculty out of doors without guidance or supervision from another person most of the time if he does not take advantage of the faculty in such circumstances because of fear or anxiety.

- (8) Paragraph (7) shall not apply where the fear or anxiety is:
- (a) a symptom of a mental disability; and
 - (b) so severe as to prevent the person from taking advantage of the faculty in such circumstances."

7. These amendments limit the circumstances in which a claim for lower mobility may be justified where the impediment to the claimant's walking arises because of fear or anxiety. The paragraphs were introduced to reverse R(DLA)4/01 to the extent that the Tribunal of Commissioners held that fear and anxiety not amounting to mental disability could have the effect that a person could not take advantage of the faculty of walking out of doors. The claimant is now not entitled to lower mobility in such circumstances *unless* he establishes that his problems are the symptom of a *mental* disability and are so *severe* as to prevent him from going out without appropriate help, in which case both conditions of regulation 12(8) are met and regulation 12(7) does not apply.

8. Accordingly, in this particular type of case, it must be established that, if it is anxiety which causes the asserted walking difficulties, then it amounts to a symptom of the necessary mental disability and that the problems are so severe that he cannot take advantage of the faculty of walking out of doors. The tribunal erred in law in failing to consider the questions arising under regulation 12(7) and (8) of the 1991 regulations. However, even if he has the necessary mental disability (which I stress I cannot decide), the claimant still then requires to show that he is unable to walk out of doors most of the time (as distinct to preferring not to do so) unless he has guidance or supervision.

9. However, an entirely separate issue which should have been addressed arises on account of any actual asthma attacks. The issue is whether, on account of the possibility of such attacks, the claimant *cannot* reasonably be expected to venture outside without a companion *most* of the time. This requires more than him merely establishing that it is reasonable to have someone with him. Although he does not have to show that, if an asthma attack occurred, he would be put in danger (the test for lower mobility is distinct from the supervision test for the care component of disability living allowance, although such a risk is clearly very evidentially relevant), yet he does have to demonstrate that the level of difficulty caused to him from the onset of an asthma attack, for example by confusion and disorientation, is such that he "cannot take advantage of the faculty [of walking] out of doors without guidance or supervision from another person most of the time". This is a question quite distinct from the one arising under regulation 12(7) and (8).

10. So far as the meaning of "supervision" is concerned, the new tribunal is referred to what Mr Commissioner Rowland says at paragraph 6 of CDLA/4438/03:-

"...It is true that the mere fact that a claimant derives reassurance from another person does not mean that that person is providing guidance or supervision but the point was made in CDLA/42/94, at paragraph 22(1), that it is equally true that the fact that a claimant derives reassurance from another person does not mean that that other person is *not* providing guidance or supervision. See, also, R(DLA) 4/01, at paragraph 18, where a Tribunal of Commissioners followed CDLA/42/94 in holding that supervision requires an element of monitoring or readiness to intervene so as to prevent the claimant's ability to take advantage of the faculty of walking from being compromised."

11. The guidance and supervision envisaged does not have to relate directly to the act of walking but it must be instrumental in allowing the appellant to go out of doors and exercise that faculty. Supervising a person who is subject to severe asthma *may* constitute the appropriate supervision, depending on the degree of severity of those attacks and their frequency. Such supervision does not assist walking *per se* but, without the guarantee that someone is with the claimant who would provide assistance should such an attack occur, such a claimant *may* be unable to use the faculty of walking, which is otherwise unimpeded.

12. The award of lower mobility made by the tribunal necessarily falls with the set aside of this decision. The new tribunal will look at the matter again, having regard firstly to the appellant's anxiety about his asthma, and secondly to the possible need for a companion because of any risk to the appellant from an asthma episode if he is out alone; these are two distinct ways of satisfying entitlement.

Summary

13. The appeal is therefore remitted to a new tribunal to begin again. It is emphasised that there will be a complete rehearing on the basis of the evidence and arguments available to the new tribunal, and in accordance with my guidance above, and the determination of the claimant's case on the merits is entirely for them. Although the claimant has been successful in his appeal limited to issues of law, the decision on the facts in his case remains open.

(signed)
L T PARKER
Commissioner
Date: 27 July 2004