

DECISION OF SOCIAL SECURITY COMMISSIONER**Decision**

1. The decision of the tribunal sitting in Glasgow on 11 May 2005 (the tribunal) is wrong in law. I therefore set the decision aside and remit the appeal to a new tribunal for a fresh hearing. The decision under consideration becomes, once more, despite this being the second return from a Commissioner, an appeal against the decision notified 4 June 2004 of a decision maker (DM) on behalf of the Secretary of State, which DM's decision refused entitlement to disability living allowance (DLA), either component at any rate, from and including the date of a new claim made 26 March 2004.

Error of law*Incorrect approach to an advance claim*

2. I set out the relevant law at paragraphs 4 to 6 (albeit paragraph 4 was incorrectly given twice, for which I apologise) of CSDLA/852/02, as follows:

"4. ... The relevant regulation is Regulation 13A of the Social Security (Claims and Payments) Regulations 1987 (S.I. 1987/1968), not Regulation 13, on which the tribunal relied. Regulation 13A, so far as material, reads:-

'13A.-(1) Where, although a person does not satisfy the requirements for entitlement to disability living allowance on the date on which the claim is made, the Secretary of State is of the opinion that unless there is a change of circumstances he will satisfy those requirements for a period beginning on a day ("the relevant day") not more than 3 months after the date on which the claim is made, then the Secretary of State may award disability living allowance from the relevant day subject to the condition that the person satisfies the requirements for entitlement on the relevant day.

...

(3) A decision pursuant to paragraph (1) or (2) to award benefit may be revised under section 9 of the Social Security Act 1998 if the requirements for entitlement are found not to have been satisfied when disability living allowance becomes payable under the award.'

4. Regulation 13A thus permits an award of DLA where a claim is made no more than 3 months before the date from which the award takes effect, if the DM considers that by that date the claimant will satisfy the 3 months qualifying period for DLA and is then likely so to satisfy the qualifying conditions for a further 6 month period. The claim subsists until the matter is determined by the DM (s.8(2)(a) of the Social Security Act 1998).

5. A claim is to be treated as being continuously made until it is determined. Therefore, although Regulation 13A only benefits the claimant if the claim is made within the relevant 3 month period, it applies provided that the DLA conditions in

question are satisfied by the date of the Secretary of State's decision under appeal and seemed likely to continue for both the 3 month qualifying period and the 6 month prospective period, so that the Secretary of State could then have made an advance award.

6. The issue for the tribunal was, therefore, whether ... when the claim was decided by the Secretary of State (and beyond which circumstances could not be taken because of section 12(8)(b) of the Social Security Act 1998), circumstances existed, (even if proved by later evidence not available to the DM at the time) which justified an award under regulation 13A".

3. The tribunal went wrong when applying the above rules, because it gave no clear findings and reasons on why it chose 26 April 2004 as the date when the claimant had satisfied the relevant DLA conditions for higher rate mobility component of DLA (higher mobility) for the required three month qualifying period, so that an award could begin then.

4. The evidence was conflicting. In her claim form, the claimant said that the problems getting about began around March 2003. To the examining medical practitioner (EMP) who visited and examined her on 25 May 2004, she said that her current situation existed from January 2004. The EMP opined that her sufficiently reduced mobility dated from 22 April 2004 which was when she started chemotherapy. The tribunal:

"... agreed with the Decision Maker at pages 75 – 80 of the papers that although at the date of claim on 26th March 2004, she had not satisfied the conditions for 3 months, she had done so by 26th April 2004, which was prior to the Decision appealed against".

However, with all due respect to the DM in question, I find those pages entirely meaningless and certainly they neither support nor provide lack of support for any proposition that the claimant had satisfied the conditions for higher mobility for three months by 26 April 2004.

5. It was the EMP's opinion that the claimant's then current condition was largely due to her chemotherapy and "she should improve when this and her radiotherapy are over – in about 6 months". But the tribunal terminated the award by 25 October 2004, when the chemotherapy finished, without any expressed consideration of the claimant's evidence at the hearing that the radiotherapy commenced after the chemotherapy ended, nor the information in a letter dated 24 September 2004 (lodged to an earlier tribunal from a breast clinical nurse specialist) that her treatment would not be complete until January 1st 2005, nor her general practitioner's statement in a letter 3 May 2005 that radiotherapy followed the many months of chemotherapy.

6. The tribunal thus went wrong by inadequate findings and reasons on two critical dates; both when the claimant first satisfied the three months qualifying period and then as to how long she was likely to continue to satisfy those entitling conditions. Moreover, at the latest, she had to satisfy such conditions by 4 June 2004 (the date of the DM's decision under appeal), and for a three month qualifying period which could precede, straddle or run immediately from the DM's decision, followed by a minimum six month prospective period. If the EMP's start date is accepted, no award could begin before 22 July 2004 but this would still be within the rules because the claim is treated as subsisting until 4 June 2004. In any event, all issues of fact are for the new tribunal.

Summary

7. 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 her appeal limited to issues of law, the decision on the facts in her case remains open.

8. As the decision of a prior tribunal was set aside by another Commissioner because the issue of falls was not treated correctly I find it somewhat surprising, not that the tribunal took the following approach:

“... although evidence was taken from [the claimant] in respect of her propensity to fall, as the higher rate had been granted, the Tribunal did not go on to consider the lower rate of the Mobility Component”,

but that the tribunal did not make any findings on falls referable to care needs. This is presumably because, despite supervision having been put in issue before the previous Commissioner, it was not so contended before the tribunal. However, if any issue of propensity to fall arose at the relevant time, an inquisitorial tribunal should correctly have considered it in the context of the care component, irrespective of the submission from the representative.

(Signed)
L T PARKER
Commissioner
Date: 12 August 2005