Bulletin 150

THE SOCIAL SECURITY COMMISSIONERS

Commissioner's Case No: CSDLA/606/03

SOCIAL SECURITY ACT 1998

APPEAL FROM THE APPEAL TRIBUNAL UPON A QUESTION OF LAW

COMMISSIONER: L T PARKER

Appellant:

Respondent: Secretary of State

Tribunal: Dundee

Tribunal Case No:

DECISION OF SOCIAL SECURITY COMMISSIONER

1. The decision of the Dundee appeal tribunal (the tribunal) sitting on 12 February 2003 is wrong in law. I set it aside and remit the case to a differently constituted tribunal for rehearing and redetermination.

2. I have been associated with tribunal adjudication, first as a Chairman and now as a Commissioner, since 1986. Never have I seen an instance where a tribunal has shown such a lack of essential judicial instinct. The appellant was completely denied the fair hearing to which she is entitled both at common law and under the Human Rights Act 1998 (incorporating the European Convention on Human Rights into British law).

Background

3. The appellant was in receipt of the higher rate of the mobility component (higher mobility) of disability living allowance (DLA) from 12 September 2000 to 11 September 2002. At issue in this appeal is a renewal claim for DLA in which the claimant also seeks care component. A decision maker (DM) refused either component of DLA at any rate from the renewal date, without seeking any medical endorsement.

4. A tribunal on 2 December 2002 adjourned for a report by an examining medical practitioner (EMP). The EMP on 16 December 2002 opined that the appellant could probably walk 50 – 100 metres before the onset of severe discomfort, with some stops due to left tendo-achilles pain and taking 2 – 3 minutes. The only care needs acknowledged by the EMP was that she possibly required some help with using a cooker and coping with hot pans, and that occasional falls were possible due to pain in the left ankle upsetting her balance momentarily. The EMP noted that the last fall was a month ago in the kitchen when the appellant was turning.

5. The appellant's representative also produced evidence from the general practitioner (GP) dated 16 September 2002 confirming the appellant's "chronic retro-calcaneal bursitis" as "very painful". The GP said that the appellant's disability is permanent and that, as a result, she can walk only at an extremely slow pace and in excessive pain. Founding on this, the representative in a written submission to the tribunal asked that an indefinite award of DLA should be made.

6. The representative (a local welfare rights officer) sought on the appellant's behalf a continuation of higher mobility and also submitted that the appellant satisfied entitlement to the lowest rate of the care component (lowest care) through an inability to prepare a cooked main meal for herself. This was because:-

> "Although she is able to sit to prepare vegetables, she has extreme difficulty coping with pans such as lifting them on/off the hob, draining potatoes, etc, due to balance problems. She also has difficulty bending to put food in/out the oven. She finds it hazardous in the kitchen and recently fell, having lost her balance, and dropped a Pyrex jug full of baked beans on the floor. Her husband therefore has to undertake most of the cooking."

7. The appellant attended the hearing with the representative. No presenting officer appeared on behalf of the Department. The Chairman's record of proceedings reads:-

> "Parties introduced.
> offer put to the appellant just to reinstate higher mobility
> told to think about it. 10 mins –
> put to appellant risk of losing all if goes ahead.
> told to think again. 5 mins later –
> has decided will accept offer"

The tribunal decision

8. The tribunal unanimously decided that the appellant was entitled to higher mobility from 12 September 2002 to 11 September 2004.

9. Its facts were these:-

> "The Appellant who is aged 50 suffers from Left Sided Bursitis and Chronic Achilles Tendonitis, osteoarthritis of the left heel and the left knee and hypertension. She also wears two hearing aids. Surgery has not improved her tendonitis, nor has physiotherapy. She has very little foot movement. She can walk 50-100 metres outside with some stops due to tendo-achilles pain. She is virtually unable to walk.
>
> The Appellant has no care needs."

10. These were the tribunal's reasons:-

> "The findings of the examining Medical Practitioner who saw the Appellant on 16th December, 2002 were accepted as to the Appellant's abilities and needs.
>
> Prior to the commencement of the Appeal the Tribunal considered all the papers and formed the view that reinstatement of the award of the higher Mobility component would be appropriate. When the Appellant and her representative came into the Hearing Room it was put to them that the Tribunal would be prepared to reinstate that award but that if the Appellant wished to insist upon an award for the care component, the Appeal would have to be heard in all matters, including mobility, and that may result, after hearing evidence, in the Appellant not being awarded the Mobility Component at all and in being unsuccessful in the care component. It was explained to her that this was a risk she would have to take if she insisted on a Hearing relating to the care component as mobility would also then have to be considered.
>
> The Appellant and her representative then had an opportunity to consider this offer in private. After some minutes, the Appellant's representative and Appellant returned and advised that the Appellant wanted to proceed. The Tribunal then explained the risks once again to the Appellant (the Tribunal by then, having seen the Appellant walk in and out of the Hearing Room on several occasions with little apparent difficulty). The Appellant's representative then discussed the matter in private with the Appellant again and she agreed subsequently to accept the offer of higher rate mobility being reinstated. The Tribunal did not consider that the appellant had care needs which would enable her to claim any level of the care component."

Appeal to the Commissioner

11. Appeal is made on the appellant's behalf on the ground that the above process was a breach of the rules of natural justice. The Secretary of State supports the appeal on that basis. I set out the Secretary of State's submission, so far as pertinent, because I consider it is entirely correct. It reads:-

> "I submit that Article 6(1) of the European Convention on Human Rights is engaged. That provides that everyone is entitled to a fair and public hearing by an independent and impartial tribunal in the determination of their civil rights. In the conjoined decisions CIB/2751/02 and CS/3202/02 the Commissioner said:
>
> > 'Article 6(1) provides as relevant: "everyone is entitled to a fair and public hearing ..." The European Court of Human Rights has indicated that the effect of Article 6(1):
> >
> > > "is, inter alia, to place the 'tribunal' under a duty to conduct a proper examination of the submissions, arguments and evidence adduced by the parties, without prejudice to its assessment of whether they are relevant to its decision" (*Kraska v Switzerland*, (1994) 18 EHRR 188; paragraph 30)."'
>
> I submit that the tribunal did not undertake a proper examination of the evidence, as is made apparent by reference in the reasons to the tribunal having observed the claimant go in and out of the Hearing Room on several occasions with little apparent difficulty. The language of the reasons also appears indicative, in my submission, of the tribunal having prejudged the case and preferring no obstruction to their deciding it with no personal input from the claimant or her representative. At one point they referred to the consequences if the claimant 'wished to insist upon an award for the care component'. The impression created for the claimant of a tribunal wanting to clear the case as quickly as possible ..... is not without foundation, in my submission. In conclusion I submit that the claimant was not allowed a fair hearing, and the tribunal's reasons for allowing higher rate mobility component were as inadequate as were their reasons for disallowing care component."

My conclusion and reasons

Lack of a fair hearing

12. I am very surprised that the Chairman could produce the statement of reasons without appreciating what a travesty of justice this detailed. This only underscores the lamentable lack of understanding of how adjudication is fairly and properly conducted.

13. Was the tribunal drawing an analogy with sentence discounting? This is the practice whereby an offender may receive a lesser sentence than would otherwise have been appropriate if he or she pleads guilty. This is permissible under the terms of s.196(1) of the Criminal Procedure (Scotland) Act 1995.

14. The most commonly accepted rationale for sentence discounting is that it saves public money and court time. However, it is quite inappropriate in the Social Security jurisdiction which has no analogies whatsover to the criminal system. Apart from the fact that there was no presenting officer to agree to any such plea bargain, benefit adjudication is inquisitorial not adversarial. On the one hand, entitlement is a matter of right if the appropriate criteria prescribed by statute are made out; on the other hand, as benefits are funded by public money, the same should in no circumstances be awarded unless such criteria are established having regard to the appropriate onus and standard of proof. A decision maker (DM) cannot be estopped by word or action from applying the legislative conditions; a claimant must be afforded a full and fair hearing by an independent and impartial tribunal in determining the issues in contention.

15. The Chairman has the right to control the judicial procedure in order to curtail irrelevant or repetitive or abusive debate. But it is quite appalling for a tribunal to lean on a party in the way that happened here, as is apparent from the face of the record.

16. The tribunal pressurised the appellant into giving up her right to a hearing with respect to the care component. Equally bad from the public perception is that the tribunal awarded higher mobility, despite its doubts after it took the view that the appellant had been able to walk in and out of the hearing room more than once with little apparent difficulty. The conclusion is inescapable that the tribunal, in dereliction of its judicial duty, chose to strike a bargain with the appellant for the sake of its own convenience.

Inadequate reasons

17. The tribunal found as fact that the appellant had no care needs but without any explanation of why it did so. It said that it accepted the EMP's findings on her abilities and needs; this report gave some support to the appellant's asserted need for help when cooking, which support had been expanded by her representative in the written submission, all of which was ignored by the tribunal.

18. Furthermore, standing the GP's statement about a "permanent disability", reiterated in the representative's written submission and coupled with a request for an indefinite award of DLA, the tribunal failed to explain why it restricted its award of higher mobility.

Summary

19. 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 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.

(signed)
L T PARKER
Commissioner
Date: 13 January 2004