Bulletin 191

THE SOCIAL SECURITY COMMISSIONERS

Commissioner's Case No: CSDLA/731/04

SOCIAL SECURITY ACT 1998

APPEAL FROM THE APPEAL TRIBUNAL UPON A QUESTION OF LAW

COMMISSIONER: D J MAY QC

Oral Hearing

DECISION OF SOCIAL SECURITY COMMISSIONER

1. My decision is that the decision of the appeal tribunal given at Glasgow on 7 July 2004 is erroneous upon a point of law. I set it aside. I remit the case to a freshly constituted appeal tribunal for a rehearing.

2. This appeal came before me for an oral hearing on 18 May 2005. It was, after submissions, adjourned to 1 June 2005 for further submission. It reconvened on that date. The claimant was represented by Mr Orr, a welfare rights officer of the City of Glasgow Council. The Secretary of State was represented by Mr Brodie, Advocate, instructed by Miss Parker, Solicitor, of the Office of the Solicitor to the Advocate General.

3. The claimant has appealed to the Commissioner against the decision of the tribunal which was to the effect that the claimant is not entitled to either component of disability living allowance with effect from 17 October 2003. The scope of the appeal to the tribunal and before me related to the middle rate of the care component and lower of the rate mobility component.

4. The tribunal made findings in fact that the claimant had Crohn's disease and suffered from depression. The tribunal's finding in fact in respect of the claimant's Crohn's disease was in paragraph 6 of their statement of reasons where they said:

> "The Appellant as previously indicated suffered from Crohns (sic) disease. This manifested itself in problems with her bowel over which she sometimes lost control and this could happen approximately once per week. She had no problems with her bladder control. She carried a change of clothes with her whenever she went out. The Appellant rarely went out socially".

The tribunal then went on to say in respect of her requirements arising out of that:

> "7. There was no evidence that the Appellant had any care needs. She was working and her current Employers were flexible in relation to the hours that she worked. She could manage her toilet needs herself and could cook although her evidence was that she did not do so. The fear of having an accident with her bowels resulted in her not socialising. She stated that she suffered from depression but was receiving no treatment for this and had no such diagnosis.
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> 8. Although the Tribunal were sympathetic towards the Appellant's plight in terms of the Legislation the Appellant was not entitled to any element of the care component of disability living allowance. Although she gave evidence that her mother changed the sheets on the bed if necessary, and that her mother did the washing, the ironing and the cooking in the house, there was no evidence that the Appellant herself was not capable of carrying out these tasks. She did not require frequent attention with bodily functions throughout the day or continual supervision throughout the day to avoid substantial danger to herself or to others".

5. Mr Orr submitted that the bodily function in respect of which the claimant suffered impairment was the operation of her bowels. It was his submission that the case advanced by the claimant was that the attention was required to overcome her fear of bowel

malfunctioning. It was accepted by him that she did not require any immediate needs. However, in respect of that need it is said that the tribunal did not deal with the argument advanced to them. It is said that the case was simply ignored and that accordingly the tribunal erred in law.

6. In relation to the lower rate of the mobility component the tribunal dealt with this as follows:

> "9. With regard to her mobility requirements although her evidence was that she rarely went out without another person present this appeared to the Tribunal to be as a consequence of the embarrassment that she felt if she were to lose control of her bowels rather than any reassurance or encouragement she might receive from the person accompanying her".

The manner in which the claimant presented her case was recorded in the record of proceedings:

> "Fear of having an accident, one a week. Depression, no treatment for it. No (sic) diagnosed as such".

It is also recorded in the record of proceedings:

> "...don't go out on own. Don't go out to shops. Friends come to house. Went to friends once, had an accident ...".

Mr Orr referred me to the statutory provisions for satisfaction of the conditions for the lower rate of the mobility component. In the context of this case the test is to be found in two places. The conditions are set out in section 73(1)(d) of the Social Security Contributions and Benefits Act 1992. That provides:

> "Subject to the provisions of this Act, a person shall be entitled to the mobility component of a disability living allowance for any period in which he is over (the relevant age) and throughout which
>
> (a) he is suffering from physical disablement such that he is either unable to walk or virtually unable to do so; or
> (b) ...
> (c) ...
> (d) he is able to walk but is so severely disabled physically or mentally that, disregarding any ability he may have to use routes which are familiar to him on his own, he cannot take advantage of the faculty out of doors without guidance or supervision from another person most of the time."

7. However, it is accepted by Mr Orr that as it is the claimant's position that it is fear of an accident which is the basis of the claimant's case here, the provisions of regulation 12(7) and (8) of the Social Security (Disability Living Allowance) Regulations 1991 would require to be satisfied. These regulations 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 of walking 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) the symptom of a mental disability; and
(b) so severe as to prevent the person taking advantage of the faculty in such circumstances".

8. It was accepted by Mr Orr that the fear and anxiety could not be a symptom of Crohn's disease, thus it required to be a symptom of a mental disability. It was his submission that there was a diagnosis of depression in this case and accordingly the tribunal should have applied the statutory provisions by considering whether the fear or anxiety was a symptom of depression. However as a subsidiary submission, it was his position that by virtue of paragraphs 35 and 39 of the decision of a Tribunal of Commissioners in CDLA/1721/2004, that a diagnosis of depression was not essential and that the question for the tribunal was whether the fear or anxiety was a symptom of functional incapacity or impairment.

9. Mr Brodie conceded that there was an error in law on the part of the tribunal to consider the lower rate of the mobility component in full. He accepted that paragraphs 2 and 7 of the tribunal's statement contradicted each other in respect that in paragraph 2 there was a finding in fact that the claimant suffered from depression whereas in finding in fact 7 they found:

"... She stated that she suffered from depression but was receiving no treatment for this and had no such diagnosis".

In the context of the application of regulations 12(7) and (8) this was material. It was further his submission that it was not clear that the tribunal had appreciated that fear or anxiety could, by virtue of regulation 12(8), bring the claimant within the statutory conditions for the lower rate of the mobility component. It was said by Mr Brodie that if the claimant's fear and anxiety arose simply from a rational fear by the claimant of evacuating her bowels out of doors then she would not fall within the provisions of section 73(1)(d) when regulations 12(7) and (8) were applied.

10. I was not persuaded by Mr Orr that any error in law had been made by the tribunal in respect of the care component. I do not consider that the attention conditions of the care component are engaged by another person attempting to overcome a fear by the claimant of bowel evacuation. That is beyond what is encompassed by the legislation. I can find no error in law in their approach to the care component as set out in paragraph 8 of their reasons. However I consider that Mr Brodie's concession in respect of the lower rate mobility component is properly made and in these circumstances I hold that the tribunal has erred in law and their decision must be set aside.

11. The case goes to a freshly constituted appeal tribunal for a rehearing. Mr Orr conceded that for the purpose of regulation 12(8) the disability relied upon by the claimant for its operation is depression and that the claimant need not advance an argument based on CDLA/1721/2004. That concession is properly made. Thus I direct them that in respect of

the operation of regulation 12(7) and (8) of the regulations the mental disability relied upon for the purposes of regulation 12(8)(a) is depression. I further direct them that in these circumstances it is not necessary for the tribunal to attempt to apply what is said by the Tribunal of Commissioners CDLA/1721/2004. I direct the tribunal that if they find that the claimant's fear or anxiety is not related to a symptom of depression and is a rational fear that the claimant may evacuate her bowels out of doors then she cannot satisfy the conditions for the lower rate of the mobility component. In doing so I have accepted Mr Brodie's submission to that effect. I need only add the passing observation that it does not appear that when the Tribunal of Commissioners made their decision in CDLA/1721/2004, that the provisions of regulations 12(7) and (8) were put before them. I find it difficult to see how regulation 12(8) can have any effect without the mental disability referred to there being a recognised medical condition such as depression. A symptom of "some functional incapacity or impairment", which is how regulation 12(8) would have to be read if paragraph 39 is to be applied, is it seems to me, to be a concept without any meaning. "Symptom" is a word which would appear to me to have content only if it is used in the context of a medically recognised disablement. Mr Brodie was unable to assist me when I asked him how paragraph 39 of the Tribunal of Commissioners decision could otherwise be applied in the context of regulations 12(7) and (8). However in the event, for the reasons set out above, it is not necessary for me to attempt to make directions in relation to the content of that decision as Mr Orr has set out the basis of the argument in respect of the nature of the disability which is to be advanced before the freshly constituted tribunal, namely depression. In respect of the care component they will follow what I said in paragraph 10.

12. The appeal succeeds.

(Signed)
D J MAY QC
Commissioner
Date: 3 June 2005