Bulletin 167 (S Hist)

★ 152/01

Commissioner's File No: CSDLA/773/00

SOCIAL SECURITY ADMINISTRATION ACT 1992
SOCIAL SECURITY ACT 1998

APPLICATION FOR LEAVE TO APPEAL TO THE COURT FROM DECISION OF SOCIAL SECURITY COMMISSIONER ON A QUESTION OF LAW

RULING BY SOCIAL SECURITY COMMISSIONER

Name:

Appeal Tribunal of: 9 March 1999 at Glasgow

Case No: D/05/101/1997/00283

This is an application by the claimant for leave to appeal to the court on a question of law from my decision dated 27 July 2001.

I specify as the appropriate court, the Court of Session.

Having considered the grounds of the application, I refuse leave to appeal.

In respect of the first ground of appeal, I do not consider that the claimant has demonstrated any arguable error in law on my part having regard to the particular circumstances of the appeal before me. The claimant had the opportunity to challenge the decision of an earlier tribunal to seek the medical report which was relied upon by the tribunal whose decision was appealed against to me and did not. In these circumstances, I do not consider that it is arguable that I took an erroneous approach when dealing with the issue in paragraph 18.

I do not consider that there is any arguable error demonstrated by the second ground of appeal. The claimant seeks to argue a point before the Court which was not argued before me in relation to the tribunal's decision.

In exercising my discretion as to whether to grant leave, I also had regard to the views expressed by the Court of Appeal in England in the case of *Cook v Secretary of State for Social Security* issued on 25 April 2001. It is clear from what was said by Lady Justice Hale, whose views were the subject of agreement by the other members of the Court, that a somewhat restrictive approach to the grant of leave by that Court to appeal to them against the decision of the Commissioner would be adopted for the reasons set out therein.

In paragraph 14 of her judgement, Lady Justice Hale said:-

> "However, that leaves the question of the criterion for the grant of permission to appeal in such cases. Section 55(1) of the Access to Justice Act 1999 provides as follows:
>
> > 'Where an appeal is made to a county court of the High Court in relation to any matter, and on hearing the appeal the court makes a decision in relation to that matter, no appeal may be made to the Court of Appeal from that decision unless the Court of Appeal considers that –

(a) the appeal would raise an important point of principle or practice, or
(b) there is some other compelling reason for the Court of Appeal to hear it'

That criterion is clearly intended to be a somewhat different test from the usual criterion for the grant of permission to appeal, which is whether the appeal would have a real prospect of success, or there is some other compelling reason for the Court of Appeal to entertain it. Now is not the time to debate the precise differences between those two tests. It is clear from the words of the section that it does not apply to the appeal in this case. But many of the reasons underlying that provision apply with equal force in these circumstances, and indeed some might think them stronger."

She then elaborated this in paragraphs 15, 16 and 17.

I note that, whilst she accepts that s.55(1) of the Access to Justice Act 1999 does not apply to the Commissioners, I note that she indicates that many of the reasons underlying the provision apply with equal force to appeals from the Commissioner to the Court.

Whilst the approach of the Court of Appeal is not one which will, I appreciate, of necessity be adopted by the Court in Scotland, I consider that, until and unless the Court in Scotland expresses a different view, in the interests of comity of a British jurisdiction, which has a right of appeal to Courts exercising a different territorial jurisdiction, the restrictive approach set out by the Court of Appeal ought to be adopted by the Commissioner in determining whether to grant leave in the first place.

It should be noted that in this case the grounds of appeal do not raise any important point of principle or practice. I say that in relation to the first ground of appeal, because the statutory provisions which gave the statutory protection, which was the principle issue of the appeal before me, have now been repealed. Thus anything which the Court may say on the subject would have very limited wider application. I am further not satisfied upon my alalysis of the position in law in respect of the first ground of appeal that the grounds have any real prospect of success. The claimant will, if he wishes, have the opportunity to make an application direct to the Court for leave to appeal and the Court, I fully accept, may, after argument, not follow the approach of the Court of Appeal.

(signed)
D J MAY QC
Commissioner
Date: 21 December 2001

DECISION OF SOCIAL SECURITY COMMISSIONER

Commissioner's File No: CSDLA/773/00

Starred Decision No.: 152/01

1. My decision is that the decision of the disability appeal tribunal given at Glasgow on 9 March 1999 is not erroneous upon a point of law. The appeal fails. I dismiss it.

2. In this case the claimant was awarded the lowest rate of the care component of disability living allowance from 6 April 1992 for life. In 1995 he was awarded the higher rate of the mobility component from 1 August 1995 to 31 July 1997. On 13 February 1997 the claimant submitted a claim pack relating to a continuing entitlement to the mobility component from 1 August 1997. In a decision recorded at pages 53-56 an adjudication officer carried out a review on a basis of a change of circumstances namely that his mobility needs had continued and awarded him the higher rate of the mobility component from 1 August 1997 for life. The date of that decision was 12 March 1997. The claimant thereafter sought a review of that decision. It is contained in a letter dated 3 June 1997 and it is in the following terms:-

> "I am finding it more difficult to cope with my personal needs. Would you please look at my claim again?"

3. An adjudication officer on 14 August 1997 reviewed the decision of 12 March 1997 but decided he could not revise it so as to change the award of benefit.

4. The claimant then intimated an appeal against the decision in respect of the care component. He asserted that he should at least be entitled to the middle rate of the care component. The mobility component was not raised in issue.

5. The claimant's case came before a tribunal on 6 February 1998. The decision of that tribunal was to adjourn. In the decision notice they said:-

> "The appellant was not present. There is no medical evidence with the papers and an EMP is appropriate. In addition the Tribunal would like to consider the papers relating to the previous awards of Care and Mobility Component."

6. An examining medical practitioner's report was obtained.

7. His appeal was then heard by a differently constituted tribunal on 9 March 1999. The decision of that tribunal was as follows:-

> "The appellant is not entitled to an award of the mobility component of Disability Living Allowance from 17/5/98 and is not entitled to Middle or Higher Rate of Care Component.
>
> There are grounds for review."

8. The claimant has appealed to the Commissioner. His grounds of appeal are set out at pages 144 and 145.

9. The first ground of appeal raises the issue of the statutory protection given to life awards under

section 32(4) and 33(6) of the Social Security Administration Act 1992. The protection is given both in relation to decisions of adjudication officers and decisions of tribunals following reviews. The former being contained in section 32 and the latter being contained in section 33. In this case as can be seen from the history the claimant in seeking review only placed in issue the award of the care component. He was content to allow the award of the higher rate mobility component made in his favour to subsist. The issue as to the award of the mobility component only arose because the tribunal which sat on the 6 February 1998 adjourned the case so that an examining medical practitioner's report could be obtained and indicated that it would like to consider the awards of the mobility component as well as the care component. The examining medical practitioner's report was in conformity with the decision of the tribunal in respect that it addressed the mobility component. Included in that report was the claimant's own signed statement in respect of his walking ability. Accordingly this was evidence which was before the tribunal of 9 March 1999 whose decision is now under appeal to me.

10. In giving the reasons for their decision, it is clear that the tribunal were aware of the provisions of both sections 32(4) and 33(6). It was of course section 33(6) which was what they required to consider. That section is in the following terms:-

"33.....
(6) The tribunal shall not consider –
(a) a person's entitlement awarded for life; or
(b) the rate of a component's awarded; or
(c) the period for which a component has been so awarded,

unless –

i. the appeal expressly raises that question; or
ii. information is available to the tribunal which gives it reasonable grounds for believing that entitlement to the component, or entitlement to it at the rate awarded or for that period, ought not to continue."

The tribunal in dealing with these statutory provisions said:-

> "Clearly sub-section (c), sub-paragraph (i) did not apply, however, we took the view tha the EMP report was information before the tribunal which gave it reasonable grounds for believing that entitlement, in particular to the mobility component at the higher rate, should not continue. This is in terms of Section 33(6)(c()(ii) of that legislation. While i was not possible to test the appellant's oral evidence, there was in the papers a signed statement by the appellant at Part 1 of the EMP report indicating a substantial walking distance indeed referred to at page 105 and this was the opinion also of the Examining Medical Practitioner."

11. It is not contended in the grounds of appeal that the evidence in the examining medical practitioner's report including the signed statement was not such as to demonstrate that the claimant did not satisfy the conditions for the higher rate of the mobility component. The complaint made is related not to the decision of the tribunal whose decision is appealed against to me but that of the tribunal of 6 February 1998 in instructing the examining medical practitioner's report to include a report in respect of the mobility component. That decision however was not challenged at the time. That decision is not the subject of appeal before me. In consequence of the unchallenged decision of 8 February 1998, the examining medical practitioner's evidence was before the tribunal whose decision is appealed against to me. It is said in the first ground of appeal that the tribunal whose decision is appealed against to me were not entitled to take account of the evidence so obtained. No authority was cited for that proposition.

12. The Secretary of State has supported the claimant's appeal. In an initial submission it was simply said that the grounds of appeal were agreed with. However following a direction by me there has been elaboration of the Secretary of State's submission.

13. In doing so the Secretary of State has sought to distinguish what I said in CSDLA/147/99 upon the basis of the different factual position.

14. In CSDLA/147/99 in giving directions to the fresh tribunal in that case I said:-

> "In addition I direct the tribunal that they require to determine whether or not the adjudication officer when referring to the claimant's case a report by an examining medical practitioner deliberately sought the examination of the claimant and repor thereon in respect of the higher rate of the mobility component. If that is the position then the tribunal require to approach the case upon the basis that the decision on (sic) the adjudication officer carrying out the review under section 30(2) of the Social Security Administration Act 1992 was invalid by virtue of the statutory prohibition set out in section 32(4) of the Social Security Administration Act 1992. This is on the authority of what was said by Mr Commissioner Mitchell QC in paragraph 9 of CSDLA/120/97. However, I direct them that if they so found they are not statutorily prohibited by section 33(6) of carrying out their own review upon information contained in that examining medical practitioner's report if it was (a) accepted by them, and (b) gave them reasonable grounds for believing that entitlement to the higher rate of the mobility component ought not to continue."

The basis upon which I reached that view was related to the application of the common law in relation to the admissibility of evidence. In that case I said at paragraph 17:-

> "7. Mr Armstrong referred me to the case of Rattray v Rattray and Anderson 25R 315. In particular he referred me to the opinion of Lord Trayner where he said:-
>
> "The policy of the law in later years (and I think a good policy) has been to admit almost all evidence which will throw light on disputed facts and enable justice to be done...".
>
> He also referred me to Docherty v McGlynn 1985 SLT 237 at 239 which demonstrated an application of what was said by Lord Trayner. I am thus satisfied that evidence which the adjudication officer was disabled from using by virtue of the statutory prohibition was available to the tribunal. It thus follows that this evidence would not result in the operation of the contained in section 33(6)."

I then continued at paragraphs 19 and 20 to say:-

> "19 Miss Gibson submitted that if the approach of Mr Commissioner Mitchell QC was to be adopted then the adjudication officer could go on a fishing expedition and although could no use the evidence obtained himself could simply have it passed on to a tribunal on appeal. Mr Armstrong in his submission however said that the concept of tainted evidence is an alien one in this jurisdiction and that on the basis of the authorities to which he referred all evidence was available to the tribunal. It was also in his submission that was important that it should be s because the object of having the evidence before the tribunal was that justice was enabled to be done. Although there was some circularity in an argument which denied the adjudication officer the use of evidence by virtue of a statutory prohibition but allowed the tribunal to use such evidence the only prohibition on the tribunal was one of investigation by themselves and not the use of evidence which had been obtained.
>
> "20. I find myself inclined to the view that evidence obtained by the adjudication officer which

he could not use himself by virtue of the statutory prohibition contained in section 32(4) is no affect by the separate statutory prohibition contained in section 33(6) upon the tribunal and does not disable them from using the evidence. That prohibition is related to the actings of the tribunal themselves not to evidence obtained by others. Further I accept Mr Armstrong's submission that admissibility of evidence is not the issue. There is no more than statutory prohibition upon the adjudication officer from using information which he obtained deliberately for the purpose of obviating the statutory prohibition of the reasons set out by Mr commissioner Mitchell QC. Thus "tainting" of evidence does not arise with the effect that i cannot be used by the tribunal. Even if I were wrong about this on the authorities cited by Mr Armstrong the evidence could not be excluded from consideration. Mr Commissioner Walker in the latter case he determined namely CDLA/33775/97 appears to be contemplating a concept of inherent unfairness in the adjudication officer obtaining evidence which he himself cannot use and then praying in aid its use in an appeal by the claimant to the tribunal for the purposes of getting the tribunal to carry out a review. However, even if there is unfairness perceived I do not see that within the scope of the legislation that the use of the information can in fact be prevented. To do so would be to invoke some principle akin to personal bar which I do not think it would be appropriate to adopt standing the nature of the prohibition on the tribunal. Further, as is pointed out by Mr Armstrong there is a balancing act between the interests of the claimant and interests of the state, which pays the benefit. The whole basis of the system is that if someone satisfies the statutory conditions for an allowance he is entitled t it and if not he does not. I consider that this must be correct."

I adhere to the views which I expressed in that case.

16. The distinction which is sought to be made by the Secretary of State is that it was not the adjudication officer who sought to obtain the evidence in respect of the mobility component but the tribunal of 8 February 1998. The Secretary of State went on to submit:-

"6. In CDLA/5793/97 (starred 80/98) the EMP report was also requested by the tribunal and consequently contained information regarding the component that was not part of the appeal. Commissioner Rowland held at paragraph 16 that Section 33(6) is:

"....that provision is in mandatory terms in contrast to section 33(4) and (5). It is a deliberate exclusion of the usual inquisitorial role of the tribunal"

Further, the Commissioner held:

"20. Accordingly, I am satisfied that, at the commencement of the hearing before the firs tribunal there was no evidence upon which that tribunal could properly have believed that the claimant's entitlement to the mobility component ought not to continue. No evidence relating to the mobility component was given by the claimant at the hearing which suggests that the tribunal, quite rightly, did not ask any questions relating to that component. However, at the end of the hearing, the commissioned a medical report expressly dealing with the mobility component as well as the care component. If the tribunal were not entitled to ask questions relating to the mobility component themselves, they were not entitled to cause the questions t be asked by the doctor on their behalf. Neither was the second tribunal. In my view, the claimant's statement to Dr Hanratty about his mobility and parts 5 and 6 of the standard form DLA140 completed by the doctor dealing specifically with questions relating to the mobility component, were obtained in breach of section 33(6) and were accordingly inadmissible when the third tribunal came to consider the case."

7. I therefore submit that in the present case there appeared to be no grounds of suspicion for believing that the life award of the mobility component ought not (sic) continue as and when the first tribunal sat. Consequently the EMP report which contained information regarding the

mobility component should have been held to be inadmissible and as a result the tribunal erred in law for holding otherwise. In support of my submission I also cite paragraph 11 from CDLA/5552/99 [the facts of which are similar to the present case] in which the Commissioner held:

> "11. In my judgment, Mr Commissioner Jacobs' reference in paragraph 33.3 of CDLA/15976/96 to a general principle of the law of evidence that improperly obtained evidence is nonetheless admissible was made only in support of his narrower holding. It is clear from a reading of the whole paragraph 33 that he was not intending to say how that principle might or might not apply outside that particular context, and that he envisaged a possibly different approach where the gathering of the relevant evidence was initiated by a DAT. I have no doubt that section 33(6) does not require a different approach. A similar view was taken recently by Mr Commissioner Powell in CDLA/923/99, where he held that a subsequent DAT was not entitled to rely on an EMP's report obtained by an earlier DAT in breach of section 33(6).....I agree with and follow that legal approach."

17. The claimant adopted and agreed with that submission and went on in paragraph 6 and 7 of the response to say:-

> "6. The circumstances in CSDLA/147/99 are the same as in CDLA/15976/99. For the reasons outlined in CDLA/5552/99 I do not believe that an argument which allows evidence improperly obtained by an AO to be used at a tribunal can be applied where the evidence was improperly obtained by a previous tribunal.
>
> 7. I therefore do not consider CSDLA/147/99 to conflict with arguments put forward in Mr Brown's case nor with caselaw (sic) used to support that argument. As the first tribunal did no establish a basis upon which to seek a medical report concerning the lifetime award of high rate mobility the second tribunal were not entitled to rely on it so as to revise that award. The actions of both tribunals were in breach of s33 (6)."

18. I do not accept the submission of the Secretary of State or the claimant's representative. The tribunal which heard the claimant's appeal on 9 March 1999 was a differently constituted tribunal from that which adjourned his appeal on 6 February 1998. It was quite clear that the tribunal in the decision relating to adjournment they were seeking to explore by virtue of an examining medical practitioner's report the mobility component. There was no evident basis for them to take that course and it is apparent that in seeking a report in relation to the mobility component that that tribunal were in breach of the statutory prohibition contained in section 33(6) of the Social Security Administration Act 1992. That decision, if the claimant objected to it, ought to have been the subject of challenge. I have not addressed my mind as to whether that challenge ought to have been made by appeal or by judicial review. In the event the claimant did not challenge that decision. The evidence of the examining medical practitioner report including the signed statement from the claimant was obtained. Once obtained and the appeal having been put out before a differently constituted tribunal, the qualification to the statutory prohibition contained in section 33(6)(ii) applied as the evidence contained in the examining medical practitioner's report was on the common law rules of evidence admissible and the statutory prohibition was circumvented the principles are exactly the same as those applied by me in CSDLA/147/99. Having failed to challenge the decision of the tribunal of 6 February 1998 the claimant requires to live with the consequences.

19. Mr Commissioner Rowland in CDLA/5793/1997 said:-

> "A tribunal are not required to close their eyes and ears to unsolicited information but it is implicit in section 33(6) that a tribunal may not themselves ask questions for the purpose of

> obtaining information which might give them reasonable grounds for believing [that] entitlement to the component that has been awarded for life ought not to continue."

In paragraph 20 he went on to say:

> "If the tribunal were not entitled to ask questions relating to the mobility componen themselves, the were not entitled to cause the questions to be asked by a doctor on their behalf."

20. What in my view Mr Commissioner Rowland and indeed Mr Commissioner Powell in CDLA/923/99 have failed to take into account is that the tribunals in the cases before them and here had before them evidence which was admissible which they themselves did not seek to elicit. In circumstances where the decision to obtain the report was not challenged the evidence obtained is admissible and the exception contained in section 33(6)(b)(ii) is satisfied. I should perhaps indicate that in the context of section 33(6) I confirm the applicability of what I said in the last few sentences of paragraph 20 of CSDLA/147/99 which are recorded in paragraph 15. The circumstances of the case determined by Mr Commissioner Mesher appear to be somewhat different in respect that both the chairman and the medical member of the tribunal which ordered the report were also members of the tribunal which determined the merits of the case. I reserve my own position as to whether these facts would alter the application of the principles I have set out above in the application of these facts to the law. My inclination is that they would not as the challenge would still require to be made to the decision ordering the report and if that was not done the consequences outlined by me would follow. However the circumstances of Mr Commissioner Mesher's case are not what I have to decide. I do however note that he himself did not seek to distinguish the position in the case he decided from those decided by Mr Commissioner Rowland and Mr Commissioner Powell.

21. I consider that there is no merit in the second ground of appeal it is being contended that because in the examining medical practitioner's report form there is no tick in one of the boxes provided which have the statements:-

"I have read this statement"

"This statement has been reach back to me"

It is asserted that by virtue of the absence of a tick in either of these boxes it remains questionable as to whether the claimant's statement as to his walking ability contained therein is valid. I do no accept that in respect that the claimant signed the report he gave and in doing so declared:-

"I agree that this information is correct."

It is implicit in that either the claimant read the statement or it was read over to him. I am als satisfied that the tribunal assessed the evidence before them in determining (a) whether there were grounds to review the award and (b) whether the conditions for the higher rate mobility componen were satisfied having determined that there was a basis to review. The fact that the claimant is recorded as having said in the examining medical practitioner's report that his walking had been worse in the last year is not material for that purpose.

22. The third ground of appeal is stated in the following way:-

> "3. The question arises as to whether the claimant was required to be given written notification that the lifetime award was under consideration by the tribunal of 9.3.99."

I do not consider that there is any substance in this ground of appeal. It is not asserted in the grounds that the claimant was required to be given written notification. The claimant had intimated on the 17

February 1999 that he was withdrawing his appeal but that request was refused by a full time chairman. The claimant had the opportunity to attend the tribunal and chose not to do so. I do no consider that he was entitled in the circumstances of both the terms of the unchallenged tribunal decision of 8 February 1999 and the content of the examining medical practitioner's report to assume that there was no possibility of the mobility component being considered by the tribunal. I thus consider that there is no substance in this ground.

23. The fourth ground of appeal is related an asserted inadequacy of facts in reasons in respect of the care component. I find it somewhat surprising that this ground is made standing the fact that the claimant sought to withdraw his appeal. That would tend to imply that he was satisfied with the aware of the care component that he had. In the event the tribunal gave a reasoned basis for accepting the evidence of the examining medical practitioner in respect of attention needs. That was a matter which was within their province and I consider that the facts and reasons for their decision are adequately stated. This is particularly so having regard to the claimant's indication that he was withdrawing his appeal and in the event that that application was refused his non-appearance before the appeal tribunal to make submissions and given evidence thereof.

24. The appeal fails.

D J MAY QC

Commissioner

Date: 27 July 2001