Bulletin 174 [CSH?]

DECISION OF SOCIAL SECURITY COMMISSIONER

1. The decision of the Dumfries appeal tribunal (the tribunal) held on 8 July 2002 is not in error of law. The decision therefore stands.

The issues

2. These are firstly, the extent of the powers of a district chairman (DC) under regulation 38(2) (regulation 38(2)) of the Social Security and Child Support (Decisions and Appeals) Regulations 1999 (the regulations).

3. **Regulation 38(2) reads:-**

> "A legally qualified panel member may give directions requiring a party to the proceedings to comply with any provision of these Regulations and may at any stage of the proceedings, either of his own motion or on a written application made to the clerk to the appeal tribunal by any party to the proceedings, give such directions as he may consider necessary or desirable for the just, effective and efficient conduct of the proceedings and may direct any party to the proceedings to provide such particulars or to produce such documents as may be reasonably required."

4. Secondly, may a second tribunal proceed when an earlier tribunal has adjourned giving directions with which there has not been full compliance? Regulation 51(4) of the regulations reads:-

> "An oral hearing may be adjourned by the appeal tribunal at any time on the application of any party to the proceedings or of its own motion."

5. Prior to 20 May 2002, regulation 51(5) of the regulations read:-

> "Where a hearing has been adjourned and it is not practicable, or would cause undue delay, for it to be resumed before a tribunal consisting of the same member or members, the appeal or referral should be heard by a differently constituted tribunal and the proceedings shall be by way of a complete rehearing."

6. From 20 May 2002, regulations 51(5) was deleted by the Social Security and Child Support (Decisions and Appeals) (Miscellaneous Amendments) Regulations 2002 (S.I. No 1379).

Background

7. The appeal concerns a renewal claim for disability living allowance (DLA). The appellant had previously received higher rate of the mobility component and middle rate of the care component but neither component at any rate was awarded on renewal. The adverse decision under appeal to a tribunal was made on 20 October 2001 and followed the decision of an examining medical practitioner (EMP) who carried out his examination on 13 October 2001.

8. A report of a telephone call made on 28 November 2001 by the appellant's husband to the Disability Benefits Directorate is in the papers prepared for the appeal hearing. It is

recorded that the husband considered that the EMP report was not done correctly because insufficiently thorough.

9. As a consequence of a direction I gave to the Secretary of State when granting the appellant leave to appeal, further information has been lodged about the appellant's disagreement with the conclusions of the EMP report. Glasgow Medical Services has not kept a copy of the appellant's letter, but have records of the two replies they sent. A holding letter was issued on 2 April 2002 stating that the points raised would be investigated. A second letter was sent to the appellant on 10 May 2002 which said that a Senior Medical Adviser had investigated the complaint. It was concluded that the EMP acted appropriately and that his report was reasonable and consistent with the information available. The letter pointed out that during the appeal process the appellant or her representative could highlight the areas where it was considered the EMP's opinion differed from their own. After the letter of 10 May 2002, there is no record of any further communication to the Department from the appellant or her representative about the EMP report.

10. A first hearing of the appeal was convened on 12 June 2002. The appellant was represented by a member of the local Citizens Advice Service which has represented her throughout these proceedings (the representative). A presenting officer (PO) attended on behalf of the Secretary of State. It is noted on the record of proceedings:-

> "Adjournment agreed by [PO]".

11. The adjournment notice reads:-

> "Appeal is adjourned in accordance with the following directions:
> Obtain fresh EMP report
>
> Adjournment is ordered because:
> Joint submission/request by both parties"

12. A copy of the adjournment notice of 12 June 2002 and the terms of an interlocutory referral dated 13 June 2002 which followed it, were both included in the appeal papers for the tribunal. On the interlocutory referral, the clerk advised the DC that:-

> "Chairman has adjourned appeal as the rep stated [the EMP] was under investigation and the EMP (sic) he had completed was inadmissible. Please advise if another EMP report is required or if the present one can be accepted and case re-listed for hearing."

13. The next day, the DC directed:-

> "Re-list – no new EMP report. I am unaware of any reason why the EMP report would be 'inadmissible'."

14. At the hearing on 8 July 2002 the chairman was the same DC. The composition of the tribunal was wholly different from that on 12 June 2002.

15. The appellant again attended with her husband. Both her representative and the PO were the same persons as at the initial hearing. There are three manuscript pages of evidence but no note on the record of proceedings of any mention by either of the parties that no further EMP report had been obtained, as directed by the previous adjournment notice.

16. The tribunal refused the appeal. Its statement included the following:-

> "....we note that there had been a previous tribunal which was adjourned on the basis of an allegation by the appellant's representative that the EMP was under some form of investigation. There was no more specification than that. At the tribunal today, clearly this was not an issue for the appellant nor her representative, who made no reference whatsoever to such an allegation. The tribunal have explained above why they were happy to accept the evidence from the EMP".

Appeal to the Commissioner

17. The representative puts forward the following ground of appeal:-

> "When the case was reheard on 8 July 2002, my colleague... did not repeat the complaint about the EMP. This was because details were already on record and because he was aware that the case had been re-listed on the directions of a full-time chairman (who was also the Chairman of the resumed hearing).
>
> In their reasons for decision, the tribunal mention that there was no further complaint about the EMP, but they have failed to explain why a second report was not obtained as required at the adjourned hearing. It is submitted that this constitutes an error of law on the grounds of inadequate reasons for their decision."

18. The Secretary of State does not support the appeal. It is submitted that a DC is entitled under regulation 38(2) to direct the appeal be re-listed without obtaining a further medical report. The Secretary of State argues that it was reasonable for the tribunal to assume that the appellant's complaint had either been resolved or that she was no longer pursuing it. No adequate explanation has been given as to why the appellant and her representative did not object once more to the report at the second tribunal, as it was by then apparent that no further report had been obtained.

19. In response, the representative argues that the Secretary of State's submission does not adequately explain why the ruling of the first tribunal was ignored. (It was also suggested that the adjourning tribunal expressed a need for a further report because "the appellant suffered from a condition that was not known at the time of the original report". However in response to a further direction, the representative apologises for this incorrect information. Another adjournment by the same tribunal on the same day had erroneously been filed with the appellant's papers.).

My conclusions and reasons

Regulation 38(2)

20. The regulatory power given to a legally qualified panel member (in practice, a DC) is a wide one, designed to ensure that the appeal process runs smoothly. This may involve overruling directions from a tribunal which cannot be followed in a practicable manner. An obvious example is where a tribunal adjourns for a report from a general practitioner or a consultant and such a report is not produced, despite the best efforts of the Appeals Service. Another example might be where a hearing is adjourned for attendance by a particular witness who then refuses to attend or is ill or goes abroad. A balance has to be drawn

between carrying out the prior tribunal's directions and deciding the appeal within a reasonable time frame.

21. However, the rationale for allowing an independent tribunal to adjourn where it considers it is right to do so would be frustrated if the DC makes an inappropriate use of the power to give directions. This was certainly an unsatisfactory adjournment by the first tribunal because it was in unspecific terms. While in *Carpenter v Secretary of State for Work and Pensions* [2003] EWCA Civ 33, the Court of Appeal held that there is no duty to provide a statement of reasons under regulation 54(4) of the regulations on an adjournment, good practice requires a brief reason for the benefit of the parties and the next tribunal.

22. There was already a contemporaneous EMP report so that, without good reasons, the expense (which is occasioned to the Appeals Service, not the appellant) and delay caused by a requirement for a second EMP report is not usually justified. Adjournments cause delay for other appellants waiting in the queue. Moreover, if the DC had known that by 12 June 2002 the appellant had already received the result of her complaint yet this does not appear to have been mentioned, this could have justified an immediate rehearing because the adjournment was based on a false premise. But I do not accept the Secretary of State's argument that unlimited powers are given by regulation 38(2). To ensure the independence of tribunals, even a poor adjournment direction has to be respected unless it frustrates the determination of the appeal within a reasonable time or is very difficult to fulfil.

Proceedings following adjournment

23. However, the only remedy a Commissioner may offer relates to the final decision. Whether the proceedings following adjournment are by way of a complete rehearing (as was the position before 20 May 2002) or a continuation of an earlier hearing, as is now permitted even if the tribunal is differently constituted, the final decision is subject to the jurisdiction of the Commissioners for error in law.

24. Events prior to a final hearing may be pertinent factors when considering the status of the final decision. So, for example, a decision to postpone a previous hearing could be a factor to be taken into account. Similarly, use by a DC of a power to give directions which subverts the purpose of a prior adjournment is relevant to the issue whether the final decision is erroneous in point of law.

25. However that could only be the case where, at the second hearing, a party objects to the treatment of a particular direction and asks the tribunal to take some remedial action which the tribunal then declines. So, if here for example, the representative had expressly objected to the tribunal continuing despite the lack of a second EMP report, the tribunal's response to that would necessarily raise the propriety of the DC's direction. The tribunal might have decided, in the light of submissions made by the appellant and the representative, to adjourn again for such a report. Alternatively, it may still have decided, as did this tribunal, that the report of the EMP provided a sufficient basis for its decision. Whether the tribunal was right in law so to proceed in such circumstances could then have been fully considered by a Commissioner. This inevitably focuses on the DC's direction which formed a building block towards the final decision.

26. But there is no error of law here. Exactly the same people were present at the second hearing as at the first, yet no objection was raised to the lack of another EMP report or to the

tribunal continuing without it. The representative's explanation for that omission in the grounds of appeal does not make sense. The only feasible explanation therefore is that the decision was made to go ahead, in the expectation that the outcome would be favourable to the appellant. The appellant cannot then later complain, having initially decided to ignore the point, that the tribunal erred by continuing despite such waiver.

27. In the absence of the matter being raised on the appellant's behalf, the tribunal had no duty to explain why a second report was not obtained. Therefore, such failure cannot constitute an error of law on the grounds of inadequate reasons for their decision.

Summary

28. My decision is therefore as set out at paragraph 1 above.

(Signed)
L T PARKER
Commissioner
Date: 3 March 2003