

Bulletin 162 3/1/01
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SOCIAL SECURITY AND CHILD SUPPORT COMMISSIONERS

Commissioner's File No.: CSDLA/1207/2000

Starred Decision No: 19/01

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Any **comments** by interested organisations or individuals on the suitability of this decision for reporting should be sent to:

*Mr P Cichosz,
Office of the Social Security and Child Support Commissioners,
5th Floor, Newspaper House, 8-16 Great New Street, London EC4A 3BN.*

so as to arrive by 4th June 2001

Comments on Northern Ireland Commissioners' decisions will be forwarded to the Northern Ireland Chief Commissioner.

19/01

Commissioner's File : CSDLA/1207/00

SOCIAL SECURITY ADMINISTRATION ACT 1992

SOCIAL SECURITY ACT 1998

**APPLICATION FOR LEAVE TO APPEAL ON A QUESTION OF LAW FROM A
DECISION OF AN APPEAL TRIBUNAL**

DETERMINATION BY SOCIAL SECURITY COMMISSIONER

ORAL HEARING

1. This is an application to a Commissioner made by post on 8 November 2000 by the claimant for leave to appeal on a question of law from the decision of the appeal tribunal dated 8 December 1999. The application was not accompanied by a copy of the tribunal's decision against which leave to appeal is sought nor a copy of the written statement of the tribunal's reasons as required by the Social Security Commissioners (Procedure) Regulations 1999. No satisfactory explanation has been tendered for their absence. However, in the circumstances and as they are both available to me in the tribunal file I waive the irregularity. Having considered the application I refuse leave to appeal.

2. This case came before me for an oral hearing on 16 January 2001. The claimant was represented by Mr Craig, a Welfare Rights Officer of the Queens Cross Housing Association. I did not direct attendance of the Secretary of State. By letter dated 9 January 2001 the Secretary of State intimated that he would neither attend nor be represented at the oral hearing. After submissions Mr Craig asked for an adjournment of the hearing to enable him to obtain further information. The hearing was resumed on 22 January 2001.

3. In this case the claimant had appealed to a disability appeal tribunal against an on any ground review carried out by an adjudication officer on 23 October 1997 which reviewed but did not revise an initial adverse decision which did not award the claimant disability living allowance. The claimant's appeal was unsuccessful. The claimant sought a set aside of the tribunal decision which was refused. Thereafter he sought leave to appeal to the Commissioner from the chairman. That application for leave to appeal was refused by the chairman on 5 October 2000. It was issued to all the parties in the case on 9 October 2000.

4. On 7 November 2000 by fax the following letter was received by the Office of the Social Security Commissioners –

“I hereby apply for leave of the Commissioner to appeal to him from the decision of the above-mentioned tribunal, as the Chairman refused leave within the last month. I

am sending this letter by fax on its own, and by post together with the accompanying documents including the application to the Chairman and the determination thereon.

The grounds on which I seek leave to appeal are as stated in the application to the Chairman dated 21/7/2000, which I am enclosing in the post.”

5. Subsequently on 10 November 2000 the Office of the Social Security Commissioners received by post another copy of the letter dated 7 November 2000 along with the documents referred to in paragraph 6.

6. The letter of 7 November 2000 throws up a number of issues for determination by me. It was faxed on its own at 6.16pm on 7 November 2000 to the Office of the Social Security Commissioners out of hours. It was also posted to the Officer of the Social Security Commissioners. It was posted along with copy of the letter of 21 July 2000 which contained the application for leave to appeal to the Commissioner to the chairman, which set out the grounds of appeal, the letter of 9 October 2000 received by the claimant’s representative on 10 October 2000 indicating that the chairman had decided not to allow the application for leave to appeal to the Commissioner and the determination by the chairman refusing leave to appeal. These documents were received by the Office of the Social Security Commissioners on 10 November 2000. It was not clear when these documents were sent to the Office of the Social Security Commissioners. At the initial hearing Mr Craig told me his office procedure would have been to photocopy the letter of 7 November 2000 for filing purposes and to transmit it to the main office for uplifting by the postman at 4.15pm. It was Mr Craig’s position that it was 90% certain that this was done on 8 November 2000. It was indicated to me by Mr Craig that his office used second class stamps. It is also possible that the document was not sent until 9 November 2000. The difference of one day was in the circumstances critical. If it was sent on 8 November 2000 it was on time and if it was sent on 9 November 2000 it was late. At the adjourned hearing Mr Craig provided a copy of his office post book which demonstrated that correspondence was sent to the Office of the Commissioner on 8 November 2000 and thereafter nothing was sent to the Commissioner until 13 November 2000. In these circumstances I accept that it has been demonstrated by documentary evidence that the application was sent by post on 8 November 2000.

7. In the light of these facts it is now necessary to look at the relevant statutory provisions governing applications for leave to appeal to the Commissioner. These are contained in the Social Security (Commissioners) Procedure Regulations 1999 and are in the following terms –

“8. - ...

(2) A notice to or other document for a Commissioner shall be delivered or sent to the office.

(3) For the purposes of any time limit, a properly addressed notice or other document sent by prepaid post, fax or email is effective from the date it is sent.

9.- ...

(2) Subject to paragraph (3) an application to a Commissioner shall be made within one month of notice of the refusal or rejection being sent to the applicant by the appeal tribunal.

(3) A Commissioner may for special reasons accept a late application or an application where the applicant failed to seek leave from the chairman within the specified time, but did so on or before the final date.

10. – (1) An application to a Commissioner for leave to appeal shall be made by notice in writing, and shall contain –

- (a) the name and address of the applicant;
- (b) the grounds on which the applicant intends to rely;
- (c) if the application is made late the grounds for seeking late acceptance; and
- (d) an address for sending notices and other documents to the applicant.

(2) The notice in paragraph (1) shall have with it copies of -

- (a) the decision against which leave to appeal is sought;
- (b) if separate, the written statement of the appeal tribunal's reasons for it; and
- (c) the notice of refusal or rejection sent to the applicant by the appeal tribunal.

(3) Where an application for leave to appeal is made by the Secretary of State he shall send each respondent a copy of the notice of application and any documents sent with it when they are sent to the Commissioner.

27. Any irregularity resulting from failure to comply with the requirements of these Regulations shall not by itself invalidate any proceedings, and the Commissioner, before reaching his decision, may waive the irregularity or take steps to remedy it.

8. The first question for determination is whether the letter of 7 November 2000 as faxed on that date can constitute an application for leave to appeal. It will be noted that the letter on its own does not comply with the requirements of regulation 10(1). The regulation is specific that the application requires to be made in writing and that it shall contain certain essential information. In this case the letter faxed on 7 November 2000 did not set out the grounds on which the claimant intended to rely. There was merely a reference to the letter seeking leave to appeal to the Commissioner from the chairman, which did not accompany the application. In addition, regulation 10(2) required that certain documents specified therein accompanied the application. In this case they did not do so.

9. It was Mr Craig's position that, when taken with the documentation subsequently sent to the Commissioner's office, the fax of the letter of 7 November 2000 was sufficient to constitute an application for leave to appeal and that provision was made by regulation 27 for the waving of any irregularities. This would in his submission remedy any defects in the initial application as faxed.

10. I am not persuaded by that argument. The provisions of regulation 10(1) in my view are fundamental constituent parts of an application for leave to appeal and not simply irregularities which can be waived. It would not for example do for a claimant to telephone the Commissioner's Office and indicate that he was seeking leave to appeal to the Commissioner and that the documents would follow later. In the same way the absence of the grounds of appeal in this case, with merely a reference to a document containing them which was not transmitted with the application, leads me to the conclusion that what was presented by fax on the 7 November 2000 was not an application. I am not prepared to accept it as such. There is a fundamental omission from it not merely an irregularity.

11. However, in this case the letter of 7 November 2000 was also transmitted by post. In that transmission there was also accompanying it the letter in which the grounds of appeal were actually set out. In these circumstances there was an application for leave to appeal albeit one in respect of which all the documents specified in regulation 10(2) did not accompany it. As I have indicated in terms of regulation 8(3) whether it was in time or not was dependent upon whether it was sent on the 8 November or 9 November 2000. As a result of the finding I have made in paragraph 6 I hold that the application was on time as it has been demonstrated with the production of the post book of the claimant's representative it was sent on 8 November. I should indicate that generally the Commissioner will require documentary evidence as to the date on which a document is sent. I would not have regarded the submission made to me by Mr Craig in this case that he was 90% sure it was the 8 November 2000 as being sufficient. Regulation 8(3) provides that a notice a document is effective from the date it is sent. That is a matter of fact to be established by the sender. The Commissioner would find it difficult to accept a document is sent on a particular date simply on the say so of the claimant, his representative or the Secretary of State, particularly where the matter is critical.

12. The question then arises as to the irregularity in that the requirements of regulation 10(2)(a) and (b) were not adhered to in the application. Mr Craig was not able to offer any satisfactory explanation as why these documents were not included with the application. As the documents are in the appeal papers before me now and I am thus able to determine the application, I am prepared to waive the irregularity. I should, however, indicate that it is a discretion which has to be exercised in each case and it cannot be automatically assumed that it will be exercised in every case where the decision notice and the statement can be found in the tribunal file. An explanation will normally be required as to why the documents are not within the papers. It will be appreciated that incomplete applications impose an additional administrative burden on the Office of the Commissioners. With the increasing number of appeals additional burdens are not welcome as they hinder the expeditious despatch of business before the Commissioner.

13. In light of the fact that I have admitted the incomplete application for leave to appeal to the Commissioner made on 8 November 2000 for consideration and determination, it is necessary for me to consider whether leave to appeal to the Commissioner should be granted. The grounds of appeal submitted to the chairman and now to the Commissioner as follows _

“(1) I submit that the reasons given for rejecting the claim do not provide enough detail as to why the evidence of care needs (e.g. in the claim pack and in the GP report) was rejected in favour of the EMP report.

(2) I submit that the reasons given with regard to attention needs, on the second-last line of the full statement, are inadequate.

(3) I submit that it was unjust to dismiss the appeal in the absence of the claimant.”

Mr Craig very properly indicated that he did not seek to insist on the third ground of appeal. Whilst the claimant was not personally present there is nothing in the record of proceedings or the application for set aside of the tribunal's decision that Mr Craig had moved for an adjournment of the hearing in the absence of the claimant, nor that there was evidence which

he wished to lead from the claimant in support of the appeal which he was unable to do because of the claimant's absence. It is apparent from the record of proceedings that the claimant's representative presented submissions in the absence of the claimant. In view of Mr Craig's indication I need say no more than that.

14. In relation to the first and second grounds of appeal Mr Craig accepted that in relation to the higher rate of the mobility component the grounds of appeal were unarguable upon the basis of the tribunal's acceptance of the examining medical practitioner's report and the reasons given by them. However, in respect of the care component it was Mr Craig's submission that standing the evidence in the claim pack particularly in relation to motivation and intellect that the tribunal required to say more than they did in their statement of reasons in relation to the care component than they did. It was suggested that there was evidence in depth, written by a welfare rights officer on behalf of the claimant, in the claim pack at pages 19, 24 to 26, 28 to 31, 33 to 37, 40 and 46 to 48 which required more detailed reasoning for its rejection than that which was given. I am not satisfied that this ground of appeal is arguable. The examining medical practitioner's report was based not only on the clinical findings of the doctor, his opinion thereon but also the claimant's own statement. It was said by Mr Craig that what was contained in the statement of the examining medical practitioner was not as wide as the evidence given in the claim pack. However, in my view the tribunal were entitled to assess the evidence and reach a conclusion thereon. Having done so and accepted the examining medical practitioner's report which did not support satisfaction of any of the elements of the care or mobility components of disability living allowance, the tribunal said sufficient to enable the claimant to know why it was that the appeal was determined in a manner which was adverse to him.

(signed)
D J MAY QC
Commissioner
Date: 25 January 2001