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DAI - Must Consider Open Unemployment
At DLA - Determination of
Claimant's Permission

CPAG

★ 61/94

JJS/MB/2

Commissioner's File:

CDLA/21/1994

SOCIAL SECURITY ACTS 1975 TO 1986

CLAIM FOR DISABILITY LIVING ALLOWANCE

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. I grant the claimant leave to appeal against the decision of the disability appeal tribunal dated 3 August 1993; as both the claimant and the adjudication officer have consented to my doing so I proceed to determine the appeal. I hold that the decision of the disability appeal tribunal in this case is erroneous in point of law and I set it aside and direct that the matter be referred to another disability appeal tribunal.

2. I have before me written argument prepared by the claimant in support of her appeal. A submission by the adjudication officer now concerned supports it.

3. The claimant has requested an oral hearing of her appeal. I have considered all the circumstances of the case and the reasons put forward in the request for the hearing and I am satisfied that both the application and the appeal can properly be determined without a hearing, and I proceed to determine the case without such a hearing.

4. The claimant suffers from arthritis. She claimed disability living allowance. She was refused it on 6 July 1992. She applied for a review. There was a review. The decision was not revised. The claimant appealed to a disability appeal tribunal. The tribunal sat on 27 May 1993. The claimant gave evidence, included in that evidence was an averment that she needed help in getting in and out of her bath and also that she was unable to prepare a meal. The members of the tribunal adjourned in order that she might present medical evidence from her general practitioner to them. This she did. At the adjourned hearing held on 3 August 1993 the members of the tribunal considered the mobility component of disability living allowance but did not address their minds to the care component. Disability living allowance consists of two components, a care component and a mobility component. Section 71 of the Social Security Contribution and Benefits Act 1992 (the Act) makes it clear that there is both a care component and a mobility component and that a person's entitlement to a disability living allowance may be an entitlement to either component or to both of them. Section 72 of the Act deals with the care component and section 73 deals

with the mobility component. The claimant had given evidence at the first sitting of the tribunal which if accepted would bring her within section 72. The evidence relating to the help required with bathing might have been of little assistance to her, but there was also the evidence that she cannot prepare a cooked meal for herself. It is to be borne in mind that she is under the age of 65 years. I agree with the adjudication officer now concerned that it was necessary for the tribunal to reach a decision on both the mobility component and the care component. The failure to deal with the care component makes their decision erroneous in point of law and I have to set it aside. It is true that the claimant did not raise the question of the care component on the claim form but she brought it fairly and squarely to the attention of the tribunal when she gave evidence at the first hearing.

5. The adjudication officer now concerned submits that a disability appeal tribunal is required to determine the disability question having regard only to the documentary and verbal evidence available to it. He points out that in the instant case the tribunal have, at least in part, based the decision on observations made during the hearing. He says that this is erroneous in point of law in that their observations amount to the subjection of the claimant to a medical test for which the tribunal have no authority to do. I do not accept the submission. Section 55 of the Social Security Administration Act provides that a disability appeal tribunal is not to carry out a physical examination of the claimant; and further that they cannot require a claimant to undergo a physical test for the purpose of determining whether he satisfies the conditions mentioned in section 73(1)(a) of the Social Security Contributions and Benefits Act 1992. It is clear that when dealing with the mobility component the tribunal are unable to carry out a walking test in order to ascertain whether the claimant is suffering from physical disablement such that he is either unable to walk or virtually unable to do so. The tribunal are precluded from conducting a walking test or making a medical examination of the claimant. However it does not appear to me that the tribunal's ocular observation of the claimant can be said to amount to a physical examination nor can it be said that the claimant has been required to undergo any physical test. It does not seem to me that the tribunal were in breach of the prohibition contained in the section. I have considered whether the reliance by the members of the tribunal on their own observation of the claimant may be objectionable on other grounds. It seems to me that a tribunal are entitled to have regard to what they see provided that the weight to be accorded to it is considered carefully. Disability appeal tribunals are not bound by the technical rules relating to admissibility of evidence and the answer depends on the weight to be attached to such observation. I remind myself of the words used by Birch J. in R. v. Madhub Chunder, (1874) 21 WRCR 13 at page 19: "For weighing evidence and drawing inferences from it, there can be no cannon. Each case presents its own peculiarities and in each commonsense and shrewdness must be brought to bear upon the facts elicited. If the tribunal were to rely on its own observation

alone, where such observation was contrary to the medical evidence, then it seems to me that the weight would be negligible. However in the case before me the tribunal's observation was but one of the factors which brought them to the conclusion that the claimant did not satisfy the conditions for the mobility component. This is clear from the reasoning of the tribunal which I set out:

"The Tribunal consider, on the balance of probability, that the appellant does not satisfy the conditions for Mobility Allowance, either from the date of her claim or from any subsequent date.

We so find, because the appellant told the Tribunal that she can walk on level ground for 5 minutes, but when she completed her claim form in March 1992, she wrote "walk for 10 mins without discomfort". She indicated that she didn't need a walking stick for frame.

The appellant came into, and went out of, the Tribunal room without any apparent walking problems.

In a letter dated 9 July 1993, her GP Dr England estimated that she could walk less than 100 yards before having to discontinue because of dyspnoea. At her probable rate of walking, the appellant should walk considerably more than 100 yards in 5 minutes.

On 17 February 1993 she wrote to the DSS "... I personally know a fair amount of people with practically nothing wrong with them physically that is receiving this claim" (ie they are getting Mobility Allowance).

In view of the above, the Tribunal are unable to conclude that the appellant cannot walk or is virtually unable to walk (because of the severe discomfort involved). Accordingly, the appellant's appeal fails."

The reference to mobility allowance is wrong, the tribunal should have referred to mobility component, but that is a venial error. The issue in this case was whether the condition set out in section 73(1)(a) - insofar as mobility component was concerned - is satisfied and it seems to me that the tribunal's findings on the issue are not erroneous.

6. I remind the new tribunal of the need to have regard to regulation 17 of the Social Security (Introduction of Disability Living Allowance) Regulations, insofar as the period 26 March 1992 to 5 April 1992 is concerned.

(Signed) J J Skinner
Commissioner

(Date) 13 May 1994