DLA — Lower Component — Coherent Test

CPAG 04/95

RMFH/SH/4

Commissioner's File: CDLA/085/1994

SOCIAL SECURITY ACTS 1975 TO 1990

SOCIAL SECURITY ADMINISTRATION ACT 1992

CLAIM FOR DISABILITY LIVING ALLOWANCE

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. My decision is that the decision of the disability appeal tribunal (DAT) given on 17 August 1993 is erroneous in point of law and accordingly I set it aside. The claimant's case is referred to another DAT for reconsideration.

2. This is the claimant's appeal against the decision of the DAT of 17 August 1993, leave having been granted by a Commissioner.

3. The claimant, who was born on 5 February 1947, was awarded mobility allowance from 21 January 1992 to 20 January 1995. Under regulation 8 of the Social Security (Introduction of Disability Living Allowance) Regulations 1991 ("the Regulations") the award of mobility allowance was converted to an award of the mobility component of disability living allowance payable at the higher rate as from 6 April 1992. The claimant claimed disability living allowance on 12 November 1992. The care component was refused on 16 December 1992. The claimant applied for a review. There was a review. The decision was not revised. The adjudication officer did not consider the entitlement to or rate of payment of the mobility component which had already been awarded at the higher rate under regulation 8(3) of the Regulations and was not disputed in the application for review.

4. The claimant and her representative attended the hearing before the DAT on 17 August 1993. Although it was agreed that the main question before the DAT was whether the claimant qualified for the lowest rate of the care component of disability living allowance, the claimant's representative requested the DAT to consider also whether the claimant satisfied the day time conditions contained in section 72(1)(a)(i) and (b)(i) of the Social Security Contributions and Benefits Act 1992

("the Act"). In the event the DAT decided that the claimant was not entitled to the care component of disability living allowance. The findings of fact read:-

> "[The claimant] has full movement of hands, arms and wrists and can stand and move on her feet."

The reasons for decision read:-

> "Although [the claimant] has limitations of movement and difficulty lifting, the tribunal feel she could cook a main meal for one. She can make a cup of tea and she would be helped by additional appliances eg. extensions on taps. She can take the vegetable out of the pan, it is not necessary to transfer the pan itself to the sink."
>
> On the findings in Box 2 [findings of fact] she can cook a main meal."

5. Regulation 26E(5)(b) of the Social Security (Adjudication) Regulations 1986 provides that every DAT chairman shall include in the record of the decision a statement of the reasons for the decision including findings on all questions of fact material to the decision. In the present case for the reasons set out below the decision was inadequate and failed to comply with the statutory requirements. As a result it was erroneous in law. The adjudication officer now concerned supports the appeal on this ground.

6. The DAT were required to determine whether the claimant qualified for the care component of disability living allowance. Section 72(1) of the Act provides so far as relevant:-

> " 72. - (1) ... a person shall be entitled to the care component of a disability living allowance for any period throughout which -
>
> (a) he is so severely disabled physically or mentally that -
>
> (i) he requires in connection with his bodily functions attention from another person for a significant portion of the day (whether during a single period or a number of periods); or
>
> (ii) he cannot prepare a cooked main meal for himself if he has the ingredients, or
>
> (b) he is so severely disabled physically or mentally that, by day, he requires from another person -

(i) frequent attention throughout the day in connection with his bodily functions; or

(ii) continual supervision throughout the day in order to avoid substantial danger to himself or others; or

(c) ..."

7. The main issue before the DAT was whether the claimant satisfied the disability test for the lowest rate of the care component contained in section 72(1)(a)(ii) of the Act. The provision contains a number of different issues for which no explanation or clarification is provided. In my view the "cooking test" is a hypothetical test to be determined objectively. Factors such as the type of facilities or equipment available and a claimant's cooking skills are irrelevant.

8. The nature of the "cooked main meal" which the claimant "cannot prepare" is crucial. In my view it is a labour intensive reasonable main daily meal freshly cooked on a traditional cooker. What is reasonable is a question of fact to be determined by reference to what is reasonable for a member of the community to which the claimant belongs eg. a vegetarian meal as opposed to one which is not. The use of the phrase "for himself" shows that the meal is intended to be just for one person, not for the whole family. The "main meal" at issue is therefore a labour intensive, main reasonable daily meal for one person, not a celebration meal or a snack. The main meal must be cooked on a daily basis and it is irrelevant that a claimant may prepare, cook and freeze a number of main meals on the days that help is provided and then defrost and heat them in a microwave on subsequent days. The test depends on what a claimant cannot do without help on each day. Because the main meal has to be cooked, the test includes all activities auxiliary to the cooking such as reaching for a saucepan, putting water in it and lifting it on and off the cooker. All cooking utensils must of course be placed in a reasonable position.

9. The word "prepare" emphasises a claimant's ability to make all the ingredients ready for cooking. This includes the peeling and chopping of fresh vegetables as opposed to frozen vegetables, which require no real preparation. However in my view a chop, a piece of fish or meat ready minced does not fall in the category of "convenience foods" and are permissible as basic ingredients. I should add for completeness that because the test is objective it is irrelevant that a claimant may never wish to cook such a meal or that it is considered financially impossible.

10. The DAT were required to consider whether the claimant could not prepare a cooked main meal for herself because she was "so severely disabled physically or mentally". The test on this

issue is subjective to be determined by a DAT as a question of fact based on the evidence before them. In the present case the DAT had before them a medical report dated 1 December 1992 from the claimant's own doctor in which he stated that her disabling condition was a "pain in back and left leg causing difficulty walking". The DAT also had a medical report dated 24 June 1993 from Mr D J Price, a Consultant Neurosurgeon, to the effect that the claimant suffered from pain in her back and left leg which had not responded to physiotherapy or surgery. The claimant said in her application that she was unable to stand for long and that she was unable to lift pans because lifting caused her pain. The Chairman's note of evidence records that the claimant said that her condition gave problems with lifting and twisting and that she was unable to bend to cupboards, lift pans or transfer them to the sink. In the light of that evidence the DAT concluded that despite the claimant's limitations of movement and difficulty lifting, she could cook a main meal for one. In my view the DAT decision was inadequate because they recorded insufficient findings of fact in relation to the claimant's ability to cook a main meal and insufficient reasons in support of their conclusion. They failed to explain the reasons for rejecting the evidence before them. The DAT did not explain whether they considered that the claimant could stand for long periods and could cope with hot pans or whether they considered that these activities were not necessary in the preparation of a main meal.

11. As stated the "cooking test" is objective and is not dependent on the type of facilities or equipment available to a claimant. The DAT further erred in law in that they considered that the test of the claimant's ability to cook a main meal was to be limited by reference to the use of special kitchen appliances to compensate for her disability, without explaining in any detail what appliances they had in mind and how these would help. In my view if a claimant cannot, given normal reasonable facilities (which might include certain devices to assist) perform the tasks necessary to prepare a main meal then the condition of section 72(1)(a)(ii) of the Act will be satisfied. Once it is established that a claimant is unable to perform those tasks it is not necessary in the context of the "main meal" test to consider whether that inability can be overcome by specially adapting the kitchen or making alternative arrangements. The test is designed as a measure of a claimant's ability to perform specific daily tasks. The "cooking test" concentrates on the extent of a claimant's abilities and not on the need for help, unlike the attention and supervision conditions contained in section 72(1)(a)(i), (b) and (c) of the Act where the test is that the disabled person must "require" attention or supervision. If an alternative to attention or supervision is reasonably available then the attention or supervision cannot be said to be required.

12. In the alternative the claimant's representative invited the DAT to consider whether the claimant was entitled to the lowest rate care component under section 72(1)(a)(i) of the Act, because the claimant required attention in connection with her bodily

functions for a significant portion of the day. The evidence in the claim pack was that the claimant required attention for bathing daily due to bleeding from an ulcerated bowel and help with dressing and undressing due to the difficulties with bending. The DAT's decision was also inadequate because there are no recorded findings of fact or reasons for decision on this issue. If DAT that rehears this case concludes that the claimant is unable to satisfy the conditions of section 72(1)(a)(ii) they should proceed to consider provisions of section 72(1)(a)(i). They should have before them decision CDLA/58/93 which gives guidance on the interpretation of "a significant portion of the day".

13. If the new DAT conclude that the claimant is able to satisfy either of the conditions contained in section 72(1)(a), they should proceed to consider whether the claimant is also able to satisfy either of the conditions contained in section 72(1)(b). This is important because the claimant may then be entitled to payment of the care component at the middle rate.

14. The claimant's appeal is allowed and I give the decision set out in paragraph 1.

(Signed) R.F.M. Heggs
Commissioner
(Date) 11 November 1994