Bulletin 162 [Starred] 7
See also CDLA/3861/1999 entitlement to care component and mobility component after 65 – have to have previously had a award of [illegible]

SOCIAL SECURITY AND CHILD SUPPORT COMMISSIONERS

Commissioner's File No.: CDLA/754/2000

Starred Decision No: 12/01

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Mr P Cichosz,
Office of the Social Security and Child Support Commissioners,
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Introduction

1. This is an appeal by the Claimant, brought with the leave of the Chairman, against a decision of the Liverpool Disability Appeal Tribunal made on 22 September 1999. For the reasons set out below that decision was in my judgment erroneous in law. I allow the appeal, set aside the decision and remit the matter for redetermination by an appeal tribunal none of whose members were members of the Tribunal. The new tribunal must comply with the directions summarised in paragraph 28 below.

The request for an oral hearing

2. In his original submissions the Claimant's representative requested an oral hearing of this appeal. On 18 December 2000 the parties were sent a draft containing my provisional views in this case, together with a direction giving them the opportunity to make any further submissions. I took that course because I felt that I had covered certain ground not covered in their original submissions. In the draft decision I stated that the request for an oral hearing was refused, but the accompanying direction indicated that I would reconsider this, if either of the parties so wished, on receipt of the further submissions. On 8 January 2001 the Claimant's representative made further written submissions. At the end of them he stated that I "may wish to hear further argument and may wish to reconsider [my] provisional view on the request for an oral hearing". However, I am satisfied that with the benefit of the original and supplemental submissions I can properly determine the appeal without an oral hearing, and I therefore refuse the request for an oral hearing, if and in so far as such a request is still being pursued.

The outline facts

3. (1) The Claimant was born on 14 June 1932. He therefore reached the age of 65 on 14 June 1997. He suffered a stroke in January 1996, and another one in October 1998. In addition to the disabling effects of those strokes, he suffers from angina and hypertension.

(2) The Claimant was awarded the mobility component of disability living allowance at the higher rate and the care component at the middle rate, each award being expressed to expire on 25 July 1997.

(3) By a decision made on 3 April 1997 on a renewal claim ("the 1997 award") the award of the higher rate of the mobility component was extended for life and the award of the middle rate of the care component was extended for a further year (i.e. until 25 July 1998).

(4) On 28 February 1998 the Claimant, for the purpose of obtaining an extended award of the care component, signed a form DLA434 headed "looking at your claim for Disability Living Allowance". Under s.30(12) of the Social Security Administration Act 1992 that application was required to be treated as an application for a review of the 1997 award. On the same date he also signed a form making a claim for attendance allowance. The Benefits Agency sought a report from the Claimant's G.P in connection with those matters, which was provided on 18 June 1998. In that report the doctor expressed the view that the Claimant had few, if any, care needs, and that he might be able to walk for 150 to 200 yards.

(5) On 3 August 1998 an adjudication officer reviewed the 1997 award on the ground that the Claimant's condition had improved and made a revised decision that the Claimant was not entitled to any rate of either component of disability living allowance from 18 June 1998 (the date of the doctor's report). (That decision referred to the application for review having been made on 20 March 1998. It is not clear why the application was said to have been made on that date, but I take the view that nothing turns on that).

(6) On 10 September 1998 the Claimant applied for a review of the decision made on 3 August 1998.

(7) As I have said above, in October 1998 the Claimant suffered a further stroke.

(8) On 10 November 1998 a different adjudication officer, pursuant to the application made on 10 September 1998, conducted an "any grounds" review of the decision of 3 August 1998, but did not revise it. It does not appear that this adjudication officer was made aware of the further stroke.

(9) On or about 18 January 1999 the Claimant made a further claim for attendance allowance.

(10)On 12 March 1999 the Claimant appealed against the decision of 10 November 1998.

(11)On 2 July 1999 an adjudication officer awarded the Claimant the lower rate of attendance allowance (for day supervision) for the period from 18 January 1999 to 22 April 2000.

(12) On 22 September 1999 the Tribunal dismissed the Claimant's appeal against the decision of 10 November 1998. The appeal now before me is from that decision of the Tribunal. The Claimant did not appear but was represented by his son (a university lecturer) before the Tribunal. He is now represented by the Disablement Resource Unit at Mount Vernon Green, Liverpool.

4. The Tribunal made clear that, but for restrictions contained in Regulation 3 of and Schedule 1 to the Social Security (Disability Living Allowance) Regulations 1991 ("the 1991 Regulations"), it would have allowed the appeal to the extent that it would have revised the 1997 award not (as the adjudication officer did) by removing the entitlement to disability living allowance from 18 June 1998, but rather by making the following awards:

   (a) lower rate of the mobility component from 18 June 1998 for life;

   (b) lower rate of the care component from 25 July 1998 to 14 October 1998 and thereafter middle rate for life.

Did the Tribunal properly consider whether there were grounds to review the 1997 award?

5. The first question which the Tribunal ought expressly to have considered was whether s.32(4) of the Social Security Administration Act 1992 prevented the adjudication officer from reviewing the Claimant's life award of the higher rate of the mobility component. Its

failure to consider that question was an error of law. However, in my judgment it is plain that the adjudication officer did have before him material which gave "reasonable grounds for believing" (see s.32(4)(b)) both that one or more of the grounds for such a review set out in s.30(2) of the 1992 Act existed and that such a review would lead to a revision of the award. I need only refer, by way of example, to the Claimant's statement in his renewal claim pack that he could walk 100 metres before feeling severe discomfort, and to the opinion of his doctor as to his walking ability which I referred to in para. 2(4) above.

6. The next question which the Tribunal ought to have considered was whether any of the grounds in s.30(2) of the 1992 Act for conducting a review of the 1997 award were in fact satisfied. So far as the care component was concerned, the expiry (under the 1997 award) of the middle rate of the care component on 25 July 1998 was a relevant change of circumstances which entitled the Tribunal to consider whether to extend the award of the care component for a further period. But it in my judgment follows from the reasoning of the Court of Appeal in Ashraf v. The Secretary of State (2nd December 1999, unreported) at pages 11A to 12B that the Tribunal was not entitled to review the 1997 award, in so far as it related to the mobility component, unless one of the s.30(2) grounds of review had been established, and that in that context the mere fact of the expiry of the award of the care component was not a relevant change of circumstance which gave rise to a power to review. The Secretary of State in supporting this appeal submits, and I accept, that the Tribunal's failure to deal in its reasons with the question of grounds for review was an error of law. The Secretary of State submits that I should refer the case to a new tribunal. However, the findings of the Tribunal as to the award which it would have made (see para. 4 above) carry quite a strong implication that it considered that the Claimant's condition had improved since the making of the 1997 award, and therefore that grounds for review did exist.

7. The evidence before the Tribunal led quite strongly to that conclusion. I need only refer to a small selection of that evidence. In the renewal claim pack which led to the making of the 1997 award (signed by the Claimant on 17 February 1997) he stated (p.18 of the appeal papers) that he could only walk a distance of 10 yards without severe discomfort, and would take about 5 minutes to do so. He further stated that he needed help getting dressed on 6 to 7 days a week, getting to and using the toilet on 6 to 7 days a week, and preparing a cooked meal on 6 to 7 days a week. In a report dated 2 March 1997 (p.57) his doctor stated that he could walk about 50 yards without severe discomfort. In the renewal claim pack which led to the review of the 1997 award (signed on 28 February 1998) the Claimant stated that he could walk about 100 yards without severe discomfort, taking about 5 minutes (p.117) and did not need any help getting dressed and undressed (p.130), coping with toilet needs (p.125) or preparing a cooked main meal (p.131). In his report dated 18 June 1998 the same G.P estimated the Claimant's walking ability at between 150 and 200 metres.

8. I have considered whether, in the light of the above evidence, I should myself find that there had been a material change of circumstances since the 1997 award was made, namely that the Claimant's condition had substantially improved. However, I have concluded that I ought not do so because a new tribunal could be significantly better placed than I am to decide when the improvement (assuming that there was one) occurred. It is just possible that the new tribunal might find that the improvement occurred before 14 June 1997 (the Claimant's 65th

birthday) That would open up the the possibility (see my conclusions below) of continued entitlement to the lower rate of the mobility component for the rest of the Claimant's life. In view of the importance of such a finding, I do not think that it would be right for me to find that the improvement did not occur until after 14 June 1997. The Tribunal's indication that it would have awarded the lower rate from 18 June 1998 for life suggests that it considered that the improvement occurred then. But that was the date of the G.P's report, and there was in my view no particular logic in choosing that date. There is nothing in the Tribunal's reasons to indicate that it considered the possibility that the improvement might have taken place before 14 June 1997 or that it appreciated the possible significance of such a finding. It follows that I must remit the case to a new tribunal for redetermination.

The effect of restrictions on an award of disability living allowance after age 65

9. It is important that I now comment, for the assistance of the new tribunal, on the submission of the Claimant's representative in support of this appeal. That submission is that the Tribunal wrongly interpreted the restrictions contained in Regulation 3 of and Schedule 1 to the 1991 Regulations (see para. 4 above). Those restrictions relate to the circumstances in which, on renewal or review, after age 65, of an award of disability living allowance which was made before but continued after that age, a further or revised award of disability living allowance can be made, whether at the same, a lower or a higher rate than that previously in payment. The restrictions were imposed against the background (i) that a new claim by a person who has attained 65 must generally be for attendance allowance, not disability living allowance and (ii) that attendance allowance has no equivalent of either (a) the mobility component or (b) the lowest rate of the care component of disability living allowance.

(1) The mobility component

10. The main practical effect in the present case of those restrictions, if they have the effect which the Tribunal considered them to have, is as follows. If after the Claimant reached the age of 65 there was an improvement in his condition (so that he no longer satisfied the conditions for the higher rate of the mobility component, but only the conditions for the lower rate):

    (a) on the improvement occurring he not only lost his entitlement to the higher rate of the mobility component, but could not gain an entitlement to the lower rate; and

    (b) he cannot ever again become entitled to either rate of the mobility component, however much his condition may deteriorate (subject to limited exceptions provided for by para. 5 of Schedule 1 to the 1991 Regulations).

11. S.75(1) of the Social Security Contributions and Benefits Act 1992 provides as follows:-

> "Except to the extent to which regulations provide otherwise, no person shall be entitled to either component of a disability living allowance for any period after he attains the age of 65 otherwise than by virtue of an award made before he attains that age."

12. Reg. 3(1) of the 1991 Regulations contains an exception not relevant here. Regulation 3(4) gives effect to Schedule 1, which contains further exceptions. The 7 paragraphs of Schedule

I seek to deal in turn with each of the combinations of circumstances which the draftsman envisaged might arise.

13. The first possibility is that the new tribunal is satisfied that a significant improvement in the Claimant's condition (entitling the Claimant only to the lower rate of the mobility component) had already occurred by the date of the 1997 award, so that the 1997 award ought to be reviewed on the ground that it was given in ignorance of, or was based on a mistake as to, some material fact. It is clear that para. 1(2) of Schedule 1 would empower the Tribunal to make a revised award of the lower rate of the mobility component and that such award could continue for such period after the Claimant attained 65 as the new tribunal considers appropriate (taking into account only circumstances obtaining up to 10 November 1998).

14. Similarly, if the new tribunal were satisfied that an improvement in the Claimant's condition (entitling him only to the lower rate of the mobility component) occurred after the making of the 1997 award but before 14 June 1997 (the Claimant's 65th birthday), para. 1(2) and (3) of Schedule 1 provide that the tribunal could review the 1997 award and make a revised decision that the Claimant was from 26 July 1997 (the date when the 1997 award commenced) entitled to the lower rate of the mobility component. That revised award could again be expressed to continue for such period after the Claimant attained 65 as the new tribunal considers appropriate.

15. In either of the circumstances in paras. 13 and 14 above the Claimant could become entitled to an award of the lower rate of the mobility component by an award made after the Claimant's 65th birthday. Further, para. 6 of Schedule 1 would then have the effect (a) that on a subsequent review or renewal claim the period of entitlement to the lower rate could be extended, for life if appropriate, but (b) that the Claimant could not ever be awarded the mobility component at the higher rate, however much his condition may have deteriorated or may hereafter deteriorate.

16. The next possibility is that the new tribunal finds (as the Tribunal appears to have done) that the improvement in the Claimant's condition (resulting in him fulfilling the conditions for the lower, rather than the higher, rate) occurred after his 65th birthday. The Tribunal held that in those circumstances the Claimant lost his entitlement to the higher rate and could not be awarded the lower rate. Para. 5 of Schedule 1 is the relevant provision.

17. The Claimant's representative submits that the Tribunal's interpretation was wrong. He submits that it does not matter that the Claimant remained entitled to the higher rate until after he attained 65, provided that he also fulfilled the conditions for the lower rate. He submits (p.216) that

> "Paragraphs 3 and 5 to Schedule 1 ..... only serve to preclude entitlement to the lower rates when higher rates have been in payment beyond the claimant's 65th birthday and the conditions of entitlement to either of the lower rates were only satisfied from after that date."

18. I have no hesitation in rejecting that submission. In my judgment para. 5 of Schedule 1 deals with the situation where there is an award of the higher rate which continues on or after age

65. In that situation the award at the higher rate can be extended, on a renewal or revision made after age 65, but (see s.75(1) of the 1992 Act and para. 5(2) of Schedule 1) an award of the lower rate cannot be made. Para. 6 deals with the situation where there is an award of the lower rate which continues on or after age 65. In that situation the award at the lower rate can be extended, on a renewal or revision made after age 65, but (see s.75(1) of the 1992 Act and para. 6(2) of Schedule 1) an award at the higher rate cannot be made.

19. The submission made by the Claimant's representative involves reading the words "this paragraph applies where a person on or after attaining the age of 65 is entitled to the mobility component payable at the lower rate specified in regulation 4(2)" in para. 6(1) as including the situation where a person has an award at the higher rate but also fulfils the requirements for the lower rate. In my judgment that submission cannot be correct, for three reasons. First, the later reference in para. 6(1)(a) to "the decision giving effect to that entitlement" shows that the opening words of para. 6 are referring, and referring only, to the situation where there is an award of the lower rate. Secondly, the situation where there is an award of the higher rate is dealt with by para. 5, which does not enable an award of the lower rate to be made. It cannot therefore fall within para. 6 as well. Thirdly, it does not in any event make much sense to say that a person who is "unable to walk or virtually unable to do so" (s.73(1)(a) of the Social Security Contributions and Benefits Act 1992) can at the same time be considered to fulfil the requirement for the lower rate in s.73(1)(d): "he is able to walk but is so severely disabled physically or mentally ...."

20. In order to avoid any possible misunderstanding I should say that the new tribunal will not be bound to find as a matter of fact that the Claimant's condition did ever improve to the extent that he ceased to qualify for the higher rate. I have made the comments which I have in order to assist the new tribunal should it find that he did cease so to qualify.

21. In para. 2 of his additional submissions dated 8 January 2001 the Claimant's representative makes some submissions which appear designed to lay the foundation for a subsequent contention to the Secretary of State (should such a contention be necessary in the light of the new tribunal's decision). That contention would appear to be that there was, within one year of the expiration (under the decision of 3 August 1998, which of course the Claimant is appealing) of the award of the higher rate of the mobility component, a further claim for disability living allowance. If so, so the argument runs, an award of the higher rate of the mobility component could still be made under para. 5 of Schedule 1. It is very doubtful whether any such contention, even if successful, would have any advantage for the Claimant. I say that because the implicit assumption made in the submission appears to be that there was a deterioration at the time of the further stroke in October 1998 which meant that he from that time again satisfied the conditions for the higher rate of the mobility component, even if there was a period when he did not. But if that was the case, the new tribunal, which can take into account circumstances down to 10 November 1998, would be able to make an award of the higher rate of the mobility component. In other words, in my judgment the new tribunal could, under para. 5 of Schedule 1, review and revise the 1997 award by removing entitlement to higher rate mobility between (say) July and October 1998, and then reinstating it from October 1998. Provided that the initial improvement in the Claimant's condition (so that he ceased to qualify for higher rate mobility) did not occur until after his 65th birthday,

entitlement to higher rate mobility could be reinstated as from October 1998 under the application for review which led to the decisions of 3 August and 10 November 1998.

22. I am in any event only concerned with the Claimant's further submission in so far as it is relevant to the question whether the Tribunal's decision was erroneous in law, and what directions should be given to the new tribunal. The Claimant's first contention in para. 2 of the additional submissions is that the request for a review on 10 September 1998 could be treated as a fresh claim. If it had been a fresh claim, one consequence would seem to be that the decision on 10 November 1998 was not appealable to the Tribunal, because no review of that decision under s.30(1) of the 1992 Act had been conducted. That would mean that the Tribunal had no jurisdiction to decide anything, so that there would be nothing to remit to a fresh tribunal. But it is in my judgment clear that the letter dated 7 September 1998 (p.146 of the case papers), received on 10 September 1998, was an application for a review of the decision made on 3 August 1998. It was not a fresh claim for disability living allowance. The second contention in para. 2 of the Claimant's representative's additional submissions is that the claim for attendance allowance made on 18 January 1999 was or should be treated as also being a claim for disability living allowance. That contention would appear to have no consequences for the new tribunal, since the decision appealed from was made before 18 January 1999.

(2) The care component

23. The decision of the new tribunal on the care component will be of much less practical importance, because the Claimant has an award of attendance allowance at the lower rate from 18 January 1999. The Tribunal's conclusion was that the Claimant satisfied the disability living allowance conditions for middle rate care up to 25 July 1998, then those for lowest rate care between 25 July and 14 October 1998 (when he had another stroke) and thereafter the conditions for middle rate care again. On that footing the Tribunal was correct in holding that it could not make any award of the care component in respect of the period between 25 July and 14 October. That follows from para. 3(2)(b) of Schedule 1 to the 1991 Regulations. I reject the submission of the Claimant's representative to the effect that para. 3(2)(a), not 3(2)(b), is the applicable provision where a person satisfies the conditions for the highest or the middle rate, but also the lowest rate. In my judgment it is plain that para. 3(2)(a)(enabling a revised or further award of the lowest rate after the age of 65) can only apply where the previous award was of the lowest rate. That is the plain meaning of the words "where a person was entitled on the previous award or on the award under review to the care component payable – (a) at the lowest rate ..."

24. However, the Tribunal was in my judgment wrong in thinking that it could not make an award of the middle rate of the care component in respect of the period after 14 October 1998. Para. 3(2)(b) of Schedule 1 permitted such an award to be made because the Claimant had had an award of the middle rate which continued until he attained 65 (and thereafter). There was no need for him to serve a further qualifying period: see Regulation 6 of the 1991 Regulations.

25. In his additional submission the Claimant's representative commented as follows on the previous paragraph (which appeared in the same form in my draft decision):

> "I beg to disagree with the commissioner's provisional view in paragraph [24] of his draft decision that the tribunal could have made an award of middle rate care component from 14/10/98. I would contend that any such award may only be made from the date that an adjudicating authority has revised the previous award on review or from the effective date of a renewal claim, but a review which, according to the adjudication officer's review decision on 3/8/98, was applied for on 30/3/98. Unfortunately, there is no evidence within the documents of the application or its source. Section 30(7) of the Administration Act requires that such evidence be produced. Entitlement to Disability Living Allowance ceased upon review on 18/6/98. Consequently, the claim also ceased to subsist beyond that date. The Tribunal had no power to consider any changes of circumstances beyond that date. The second stroke in October 1998 formed the basis of a fresh claim, which was subsequently made on 18/1/99 in the form of Attendance Allowance. Regulation 6(1) Disability Living Allowance Regulations permits the award to be made from the date of claim, as the qualifying period does not apply." (My underlining)

26. That essence of that argument is in the three sentences which I have underlined. However, that argument in my judgment overlooks the fact that the appeal to the Tribunal was from the decision of the adjudication officer (made on 10 November 1998) refusing to revise the very decision of the adjudication officer (made on 3 August 1998) which had reviewed the 1997 award by imposing a revised termination date of 18 June 1998 on the award of the care component. There was no reason why, in reviewing the 1997 award on 10 November 1998, the adjudication officer (and therefore the new tribunal) should not take into account changes in circumstances up to 10 November 1998, including the further stroke in October 1998. I therefore reject that argument.

27. In view of the award of attendance allowance as from 18 January 1999, I think that any award of the care component should probably be expressed to cease not later than that date. There appears to be nothing to prevent an award of attendance allowance subsisting at the same time as an award of the mobility component of disability living allowance. The alternative is that the new tribunal makes an award of the care component contining after 18 January 1999, if it considers that appropriate, and the award of attendance allowance is then revised or superseded so as to remove it for so long as entitlement to the care component continues (s.64(1) of the Social Security Contributions and Benefits Act 1992). I express no concluded view on this point as no submissions have been addressed to me on it. It seems unlikely that it could be of any practical importance.

Summary of directions to the new tribunal

28. The new tribunal must:

(1) Consider whether any of the grounds for reviewing the 1997 award set out in s.30(2) of the 1992 Act existed (paras. 6 to 8 above)

(2) Apply Regulation 3 of and Schedule 1 to the 1991 Regulations (so far as material in the light of its findings of fact) in accordance with my construction of those provisions in paragraphs 9 to 19, 23 and 24 above. For convenience I summarise my main conclusions by saying that the effect of those provisions is that in revising the 1997 award the new tribunal must act as follows:

(A) There is no restriction on revising the level of award, whether in relation to the mobility component or the care component, on the ground of changes in circumstances which occurred before 14 June 1997 (the Claimant's 65th birthday): para. 1 of Schedule 1.

(B) As regards changes of circumstances which occurred on or after 14 June 1997, the crux is the level of award to which the Claimant is shown to have been entitled as at that date under the 1997 award as revised (if at all) by the adjudication officer and the new tribunal on the appeal from him:

As to the mobility component:

(i) If the Claimant was then entitled to the higher rate but subsequently ceased to qualify for that rate, the tribunal cannot award him the lower rate, but could reinstate the higher rate if the effect of the further stroke in October 1998 was that he qualified for it again (para. 5 of Schedule 1);

(ii) If he was then entitled to the lower rate the tribunal cannot award him the higher rate even if the effect of the stroke in October 1998 was that he then qualified for that rate again (para. 6 of Schedule 1)

As to the care component:

(i) If he was then entitled to the middle rate but subsequently ceased to qualify for that rate, the new tribunal cannot award him the lowest rate, but could reinstate the middle rate if the effect of the further stroke in October 1998 was that he qualified for it again (para. 3(2)(b) of Schedule 1);

(ii) If he was then entitled to the lowest rate the new tribunal could award him the middle (or indeed highest) rate if the effect of the further stroke in October 1998 was that he qualified for it again. Further, it could reinstate the lowest rate even if there was a period (starting after his 65th birthday) when he did not qualify for any rate. (para. 3(2)(a) of Schedule 1).

(3) Not take into account any circumstances not obtaining on 10 November 1998 (s.12(8)(b) of the Social Security Act 1998) (save possibly to the very limited extent indicated in para. 27 above.)

(Signed) Charles Turnbull
(Commissioner)

(Date) 22 January 2001