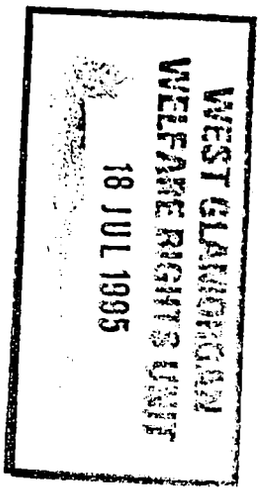
DLA Lower Rate Mobility — Propensity To Fall Not Covered

56/95

DGR/SH/13

Commissioner's File: CDLA/757/1994



SOCIAL SECURITY ACTS 1975 TO 1990

SOCIAL SECURITY ADMINISTRATION ACT 1992

CLAIM FOR DISABILITY LIVING ALLOWANCE

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Name: Sandra Brennan (Mrs)

Appeal Tribunal: Swansea

Case No: D/31/071/94/0279

1. My decision is that the decision of the disability appeal tribunal ("DAT") given on 31 August 1994 is erroneous in point of law, and accordingly I set it aside. I direct that the appeal be reheard by a differently constituted tribunal, who will have regard to the matters mentioned below.

2. This is an appeal by the claimant, brought with the leave of a Commissioner, against the decision of the DAT of 31 August 1994.

3. The question for determination by the tribunal was whether the claimant was entitled to either or both of the components of disability living allowance. In the event, the tribunal, upholding the adjudication officer, decided that the claimant was entitled to neither.

4. The adjudication officer now concerned has in his written submissions criticised the tribunal's decision on a variety of grounds. However, one contention in particular raises an important issue, and poses considerable difficulty. Accordingly, I considered that this particular matter should be the subject of oral argument before me. I therefor directed an oral hearing, at which the claimant, who was not present, was represented by Mr Stewart Wright of Counsel, whilst the adjudication officer appeared by Mr A Prosser of Counsel instructed by the Solicitor's Office of the Department of Social Security. I am grateful to both of them for their submissions.

5. There was evidence before the tribunal that the claimant's back went into spasms and caused her to drop to her knees about four or five times per day. Manifestly, this condition, if true, necessarily raised the question whether or not the claimant needed continual supervision within section 72(1)(b)(ii) of the Social Security Contributions and Benefits 1992. For that

particular provision reads as follows:-

" 72. - (1) Subject to the provisions of this Act, a person shall be entitled to the care component of a disability living allowance for any period throughout which -

.....

(b) he is so severely disabled physically or mentally that, by day, he requires from another person -

.....

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

In the event, the tribunal, although acknowledging that the claimant had spasmodic back pain which caused incapacity, would not appear to have accepted that this condition gave rise to the need for supervision to avoid substantial danger from falling. The adjudication officer now concerned, in her written submissions, contended that the tribunal had erred in point of law in failing to explain why they considered there was no need for supervision. I agree with that criticism, and on that ground alone I must necessarily set aside the tribunal's decision as being erroneous in law.

6. However, the adjudication officer now concerned went further, and contended that the claimant's propensity to fall and endanger herself gave rise not only to the need to consider the question of supervision within section 72(1)(b)(ii), but supervision within section 73(1)(d), which reads as follows:

Section 73(1) Subject to the provisions of the Act, a person shall be entitled to the mobility component of a disability living allowance for any period in which he is over the age of five and throughout which -

(d) he is able to walk but is so severely disabled physically or mentally that, disregarding any ability he may have to use routes what are familiar to him on his own, he cannot take advantage of the faculty out of doors without guidance or supervision from another person most of the time."

Moreover, the adjudication officer now concerned would seem to be suggesting that the same test applied, and that in consequence, if a claimant needed continual supervision within section 72(1)(b)(ii), he or she needed the same supervision within section 73(1)(d).

> "I submit therefore that as there was an implication that the claimant has a disability that may require someone to accompany her most of the time out of doors, due to danger arising from unexpected falls, the tribunal should have dealt with the point specifically, and addressed the question whether or not the claimant requires guidance and supervision when walking out of doors. Failure to look at this aspect of the claim amounts to [an] .... error in law."

7. The effect of the submission of the adjudication officer now concerned, if sound, would be, or course, that a person suffering from one condition, namely a propensity to fall, would be entitled to two different benefits, the care component at the middle rate, and the mobility component at the lower rate, with no offset of the one benefit against the other. Moreover, such a claimant would obtain two different benefits, notwithstanding that the person who provided the supervision on a continual basis to prevent the claimant from incurring danger would be the same person who enabled him to take advantage of the faculty of walking out of doors. But was the adjudication now concerned right in her contention that a person who qualified for the care component at the middle rate, by reason of the need for supervision to avoid danger from falling, was ipso facto also entitled to the mobility component at the lower rate?

8. Mr Wright pointed out that a person who was awarded the care component at the middle rate, for reasons unconnected with any propensity to fall, might well not be entitled to the mobility component at the lower rate. If a claimant had, for example, difficulty in taking his medicine, with consequential danger if he made a mistake, he would require supervision within section 72(1)(b)(ii), but this condition would have no bearing on his qualifying for an award under section 73(1)(d). Conversely, a person who satisfied the latter provision, because, for example, he needed supervision to overcome his agoraphobia, would not necessarily fall within section 72(1)(b)(ii). However, a claimant, who had a propensity to fall, with the consequential risk of danger, qualified for both awards. In other words, where a claimant became entitled, by reason of his liability to fall, to the care component at the middle rate, ipso facto he become entitled to the mobility component at the lower rate.

9. Mr Prosser was not prepared to go quite as far as this. He said that it was necessary to look at each individual case and decide whether on the facts, in relation to each regulation, the claimant qualified for each benefit separately, although he could not identify for me a case where a person who satisfied section 72(1)(b)(ii) on grounds of propensity to fall did not also satisfy section 73(1)(d). However he did refer me to

section 73(8) which says as follows:-

> " 73. (8) A person shall not be entitled to the mobility component for a period unless during most of that period his condition will be such as permits him from time to time to benefit from enhanced facilities for locomotion."

Presumably, a person who, for example, was suffering from advanced senile demential, and might not realise where he was, could be said to fall within this provision, and therefore, although qualifying for the care component, would not qualify for the mobility component. However, even in the case of a person who did not know where he was, he might nevertheless derive still some benefit, e.g. from fresh air. Nevertheless, although Mr Prosser was not willing to go quite as far as Mr Wright, for all practical purposes, I can see no difference between his approach and that of Mr Wright. Both of them were submitting that, if a person needed continual supervision throughout the day in order to avoid substantial danger to himself or others, he needed supervision to enable him to take advantage of the faculty of walking out of doors. They both pointed out that the word "supervision" had no statutory definition, and that there was no reason to suppose that it had any different meaning where it occurs in the two provisions in question.

10. Mr Wright elaborated further. He contended that section 73(1)(d) should be looked at broadly. If a person was likely to fall when walking, eg. from epileptic fits or, as in the present case, from back spasms, such a person might be apprehensive about walking out of doors. He might find the prospect of collapsing so frightening that he would not undertake the venture, unless he were assured of the presence of someone able to look after him. Mr Wright accepted that the claimant had, of course, to have the power of walking, but if he reasonably entertained a reluctance to exercise if in the absence of supervision, he was entitled to the mobility component at the lower rate, and it mattered not whether he was on familiar or unfamiliar routes. A fortiori he would establish title if he could not by reason of his condition walk out of doors even with supervision. The terms of section 73(1)(d) merely set out the minimum requirements for entitlement. Moreover, I do not think that Mr Prosser disagreed with this analysis. However, it must be borne in mind that, as stated above, if the above approach is the correct one, the claimant would in the circumstances postulated be able to claim in respect of the same physical condition two separate benefits without any offset . Of course, if Parliament meant this, then so it must be. But this somewhat surprising result would suggest that Mr Wright may have been adopting too liberal an interpretation of the ambit of section 73(1)(d).

11. It must be noted that the limitation imposed by section 73(1)(d) is that the claimant cannot take advantage of the faculty of walking out of doors without guidance or supervision. The section proceeds on the basis that if he has

such guidance or supervision, he will be able to walk out of doors. In other words, the guidance or supervision will remedy his incapacity. And so it may in cases where, for example, the claimant will not go out of doors because he suffers from agoraphobia or where, on going out of doors, he subsequently suffers panic attacks. In the former instance, by encouraging and cajoling him, "the supervisor" may well be able induce him to walk out of doors, and in the latter instance he may well be able effectively to reassure the claimant when the panic sets in, and thereby neutralise his condition. But what happens when a claimant has a propensity to fall, whether by reason of fits or some other medical condition? No amount of supervision will prevent the fall. It will be the epileptic fit or other condition which has caused him to fall, and during its subsistence will have prevented him from walking. There was nothing initially to stop him walking out of doors - contrast the position with someone suffering from agoraphobia - and nothing to prevent him exercising the faculty of walking save for the temporary intervention of a fall brought on by his condition. Supervision could do nothing to rectify the position. Accordingly, I do not see how in the circumstances postulated the claimant could be said to satisfy the terms of section 73(1)(d).

12. I am aware that Mr Wright, supported by Mr Prosser, contended that should a claimant refuse to walk out of doors for fear of falling unless there was someone at hand to supervise him, he could rely on the regulation in question because supervision should be interpreted widely. What prevented him from walking out of doors was the fear that there would be no one to supervise him in the sense of look after him, if and when he fell. Once given that supervision, he could walk out of doors. But, in my judgment, supervision of this kind is too remote. In the situation postulated, the claimant could go out of doors without the need for supervision, but merely preferred not to. His preference is perfectly understandable, but the terms of section 73(1)(d) are restricted to what the claimant can do as distinct from will do. Thus, in the present case there was nothing to prevent the claimant from walking out of doors. She might not want to, by reason of her alleged propensity to fall four or five times a day, and such a fall might occur while she was walking outside, but the choice was entirely hers. Supervision was not a pre-requisite for her exercising her power of walking; it was an additional advantage rendering her walking less open to risk. But section 73(1)(d) is not concerned with supervision to avoid danger to the claimant; that type of supervision is provided for under section 72(1)(d)(ii).

13. It follows from what has been said above that a person who qualifies for the care component at the middle rate by reason of a propensity to fall does not ipso facto qualify for the mobility component at the lower rate. The implication suggested by the submission of the adjudication officer now concerned is, accordingly, without force.

14. However, as explained above, I have in any event to set aside the tribunal's decision for breach of regulation 26E(5)(b)

of the Adjudication Regulations for failure to give sufficient reasons why the claimant had not established entitlement to the care component at the middle rate by reason of her propensity to fall, and at the rehearing, the claimant can, if she wishes, seek in addition to establish a claim to the mobility component at the lower rate. However, it must be borne in mind that the conditions for an award of the one benefit are quite distinct from those for the award of the other.

15. Accordingly, I direct that the appeal be reheard by a differently constituted tribunal, who will have regard to the guidance given above.

(Signed) D.G. Rice
Commissioner

(Date)

13 JUL 1995