

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. For the reasons given below, this appeal by the secretary of state is allowed. I set aside the decision of the tribunal. I also set aside the supersession decision of the decision maker issued on 29 January 2004 disallowing both components of disability living allowance from 3 November 2001 and I substitute my own decision disallowing the award of the mobility component from and including 3 November 2001 and disallowing the award of the care component from and including 29 January 2004. I also set aside the repayment decision issued on 22 February 2004 and I remit the case to a new tribunal to determine the amount of the mobility component which ought to be repaid in accordance with the directions given in paragraph 24 below.
2. The claimant, who was born in 1951, was awarded the higher rate of the mobility component of disability living allowance and the highest rate of the care component from 30 October 2000. The award was dated 4 December 2000. This followed an application by him in which he explained that he was suffering from bowel cancer and was receiving chemotherapy, radiotherapy and drugs. It appears from the GP report at p.140 of the file that this must have followed an operation for cancer on 5 July 2000. He had explained that as a result of his treatment he found walking extremely tiring and debilitating and had to stop and rest frequently. He also described various care needs and mental health problems resulting from his illness.
3. The claimant's GP reported on form DS1500 that he had carcinoma of the colon, that he had had surgery and was having chemotherapy. By a report dated 15 November 2000, a medical adviser advised the decision maker that in that adviser's opinion the claimant was suffering from a progressive disease and his life expectancy was likely to be less than six months. The medical adviser also expressed the opinion that the clinical condition described was consistent with a severe limitation of walking ability because of muscular weakness.
4. The award of disability living allowance was made on this basis. The claimant was informed of the award. He has stated that he thought that he got the award because of his cancer, but there is no evidence as to what he was told of the grounds of the award. In particular there is no evidence that he was told that the award was because of his very limited life expectancy.
5. It appears from the claimant's employers' records that he had been off work since early July 2000, but went back to work at least part-time in the second half of November 2000. He was then away again from April to November 2001, after which he went back to work until July 2003, when he lost his job. It appears from his medical records that his cancer had recurred in 2001 in his rectum and in his liver, and that he had had further surgery in August 2001. Although he had various medical problems after that time, a CT Scan in October 2003 found that there was no evidence of any spread or recurrence of his cancer, although at the date of the latest medical report in May 2004 he was due to have a colonoscopy under general anaesthesia.

6. The claimant had also been receiving other benefits and had not advised any of the relevant offices that he was working. There was a fraud investigation. It is unclear when it began, but it was ongoing by July or August 2003, when his employment record was obtained. He was interviewed on 18 August 2003, when he plainly accepted that he had been working. It is plain from his comments at p.5 of the transcript (p.69 of the file) that he had been claiming income support, housing benefit, disability living allowance and carer's allowance without disclosing that he was working. Disability living allowance is again referred to by the interviewing officer on the following page.
7. A further interview was held on 4 November 2003, when the claimant's employment record was examined in detail. It is plain from the transcript of this interview at p.17 (p.90 in the file) that by that time at least the disability living allowance unit had been informed for some time of the investigation and that he had been working. At about the same time, the unit had obtained a further medical report from the GP, which in effect said that the prognosis depended on the outcome of the investigations that were then taking place at the hospital. By 21 January 2004 it appears that a medical adviser had seen a hospital report that there was no sign of the recurrence of the cancer and that the evidence would not suggest that the claimant was terminally ill (p.100).
8. Meanwhile, on 8 January 2004, the claimant had been examined by an examining medical practitioner ("EMP"), who reported (pp.101-126) on the basis of what the claimant told him and of his own examination that in his opinion the claimant could walk 100 metres and had no care needs. The mobility needs had been the same since 4 July 2000, the day before his first operation, and had been less before that date.
9. On 29 January 2004 a decision maker superseded the decision of 4 December 2000, disallowing both components from 3 November 2001. The basis given was that there had been a change of circumstances in that the claimant was no longer terminally ill. He had also been working as a painter, which involved duties that indicated that he had no mobility or care needs, as did the EMP's report. The reasons at p.132 state that

"When accepting a date for change, customer was deemed special rules on 27/11/00, he then had operations. It appears that he no longer had the same needs from after the operation and recuperation period. It is accepted that from 3/11/01 when he returned to work he no longer had the same needs and failed to inform the DLAU."
10. Following that decision, on 22 February 2004 a decision was made that there had been a recoverable overpayment of disability living allowance between 17 November 2001 and 3 February 2004 of £11,212.95 (pp.153-160). The reason given at p.160 was that the claimant failed to inform the DLA unit that his needs had changed. His condition had improved, he was able to work and he did not have any mobility or care needs.
11. The claimant appealed both decisions, his representative stating that he did not realise that he had to notify the DLA unit if he started work, as he was still suffering the same, and he still required the same amount of care from his wife, so that there had been no change of circumstance (p.133).

12. The tribunal found, after hearing evidence from the claimant, that (Paragraph 9 of the statement of reasons):

“following his recovery from the second operation on his liver by the end of October 2001 [the claimant] was no longer terminally ill with cancer, but that he remained under review for a possible re-occurrence throughout and was never told that he was clear of the condition even after the scan in October 2003, which indicated that there had been no recurrence, and indeed he is still awaiting a colonoscopy to confirm that there has been no recurrence of the original bowel cancer. We find that his return to work on a less than full-time basis was largely to keep himself occupied and to prevent him from spending his time worrying, and that it was probably a mistake as it did involve considerable fatigue. Although he did not disclose his work, this is not directly relevant to the decision on Disability Living Allowance; we are satisfied that although he was still able to work, nothing had been said to him or had occurred which would have led him to believe that the nature of his condition had changed or that it was no longer terminal.”

13. The tribunal went on to find that, once the special provisions as to terminal illness ceased to apply, the claimant had no mobility or care needs which would entitle him to any award of disability living allowance between November 2001 and January 2004. It concluded, following CDLA/1804/1999, that so long as the special rules as to terminal illness did apply it was irrelevant that he had no mobility or care needs. It also concluded that the decision maker was justified in taking the result of the October 2003 scan together with the history of the course of the illness as showing that the claimant was no longer terminally ill for the purposes of disability living allowance, and on that basis it confirmed the decision superseding the original award on the ground of change of circumstances.
14. However, in relation to non-disclosure, it found that the only material fact was whether or not the claimant continued to be terminally ill. It found that the claimant was never told, during the relevant period, that the nature of his condition or the risks from it had materially changed. Indeed, the tribunal pointed out that the finding of the liver tumour in 2001 may well have given him more rather than less concern for his prospects at that time. It concluded that it was not reasonable to have expected the claimant to have made disclosure of the only material fact that he was no longer terminally ill, so that the overpayment was not recoverable from him.
15. The secretary of state contends first that the tribunal misdirected itself in considering the effect of CDLA/1804/1999, because, he contends, under section 73 of the Social Security Contributions and Benefits Act 1992, the claimant had still to satisfy the requirement of being unable or virtually unable to walk. I am satisfied that the tribunal correctly understood the decision in CDLA/1804/1999. However, I am also satisfied that the relevant subsections of section 73 do not bear the construction which Commissioner Henty gave them. In paragraph 3 of CDLA/1804/1999, Commissioner Henty set out the definition of terminally ill for this purpose and continued:

“Under section 72(5), such a person is taken to have satisfied the conditions for highest rate care component for the proceeding [sic] 3 months before the claim, and to satisfy those conditions for the remainder of his life. And under section 73(12), by an extraordinary piece of convoluted drafting, a similar result is achieved, so far as higher rate mobility is concerned.”

In other words, according to Commissioner Henty, under section 73(12) a person who is terminally ill is treated as satisfying the conditions of entitlement to the higher rate of the mobility component for the remainder of his life.

16. Section 73(12) provides first for the omission, in relation to a person who is terminally ill, and who makes a claim expressly on the ground that he is such a person, of section 73(9)(a). That omission does not affect the arguments on this appeal, but it leaves section 73(9) as reading:

“(9) A person shall not be entitled to the mobility component of a disability living allowance unless-

(b) he is likely to continue to satisfy one or other of those conditions throughout-

- (i) the period of six months beginning with that date; or
- (ii) (if his death is expected within the period of six months beginning with that date) the period so beginning and ending with his death.”

17. The reference to those conditions refers back to the omitted subsection (9)(a) which refers to one or other of the conditions mentioned in subsection (1), thus including inability or virtual inability to walk. The reference to a period beginning with “that date” refers back to the reference in the omitted sub-clause to “the date on which the award of that component would begin”.

18. Section 73(12) then amends sub-section (11) of that section (again only in relation to a person who is terminally ill and who makes a claim expressly on the ground that he is such a person) so that it reads as amended:

“The weekly rate of the mobility component payable to a person for each week in the period for which he is awarded that component shall be-

- (a) the higher rate, if he falls within sub-section (9) above by virtue of having satisfied or being likely to satisfy one or other of the conditions mentioned in subsection (1)(a), (b) or (c) above throughout the period mentioned in subsection (9)(b) above; and
- (b) the lower rate in any other case.”

19. It appears to be common ground that the claim was made on the basis stated, even though the evidence suggests that the claimant himself had no idea of the prognosis. However, I am unable to follow on what basis Commissioner Henty concluded, in view of the clear wording of subsection (9)(b) that the claimant was to be taken to have satisfied the conditions for higher rate mobility by reason of the wording of subsection (12). I am driven to the conclusion that in this respect CDLA/1804/1999 was wrongly decided and that I ought not to follow it. Even a terminally ill claimant will only be entitled to an award of the mobility component if, apart from the three months qualifying period, he would be entitled to it if he were not terminally ill. I note that this is also the interpretation placed on subsection (12) in volume 1 of Social Security Legislation 2005 at p.166.

20. It is apparent from the medical report that led to the award of disability living allowance that medical adviser was considering the claimant’s walking ability as described in his claim form arising from his chemotherapy and radiotherapy. In my view the claimant was under a duty to disclose that he walked well enough to return to

work. Bearing in mind that he returned to work in the latter part of November 2000, it may well be that he ought to have disclosed that fact at that time. However, the secretary of state has not sought to supersede the award from such an early date and I need only consider the position from November 2001 when the claimant returned to work after his latest operation.

21. In my judgment, had the disclosure of the claimant's walking ability been made in November 2001, this may well have led to a review of the award of disability living allowance. However, it does not follow that it would have led to the whole of the award being superseded. As the tribunal pointed out, the recurrence of the cancer and its appearance in the claimant's liver would appear to have worsened the prognosis, rather than improving it. I consider that although the award of the mobility component would have been superseded, on the balance of probabilities the award of the care component would have continued under the special rules for the terminally ill.
22. There is no suggestion on the part of the secretary of state that the claimant ought to have disclosed that he was no longer terminally ill, and indeed he states that that is not the basis of his appeal (see paragraph 9 of his submissions at p.194).
23. I therefore conclude that the correct decision would have been to supersede the decision of 4 December 2000 with a decision awarding the care component only from 3 November 2001 until the date of the supersession decision, which was 29 January 2004 by which time medical reports indicated that the claimant was not likely to die from his cancer in the following six months, so that he was no longer to be treated as terminally ill. As he had no other relevant care needs and was not terminally ill, he was then no longer entitled to any award of disability living allowance.
24. Further, it is clear that the fact that the claimant had returned to work was known to the DLA unit well before January 2004 as a result of the investigation which had taken place. I am unable to determine the exact date from the information before me, but it appears to me that once the DLA unit was aware from the investigation that the claimant had been working as a painter, it had the information which the claimant ought previously to have disclosed and any overpayment after that date is not recoverable. I am unable, on the information before me, to decide when the facts became sufficiently known to the DLA unit. Accordingly, while I set aside the decision of the tribunal for error of law, I can only substitute my own decision in respect of the overpayment decision of the decision maker. I must remit to a new tribunal the appeal against the repayment decision to determine the amount which ought to be repaid on the basis that it is limited to the mobility award up to the date when the DLA unit knew that the claimant had gone back to work.
25. The appeal is allowed and I make the order set out in paragraph 1 above.

(signed on the original)

Michael Mark
Deputy Commissioner

6 March 2006