DLA Care - Cooking Test - Reasonableness

50/96

MR/SH/6/1W/MD/LB

Commissioner's File: CDLA/902/1994

SOCIAL SECURITY ADMINISTRATION ACT 1992

SOCIAL SECURITY CONTRIBUTIONS AND BENEFITS ACT 1992

APPEAL FROM DECISION OF SOCIAL SECURITY APPEAL TRIBUNAL ON A QUESTION OF LAW

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Name: Alfred Carruthers

Disability Appeal Tribunal: Swansea

Case No: D/31/071/93/0521

1. At the oral hearing of this appeal at the Cardiff Civil Justice Centre, the claimant was represented by Mr Stephen Jones, solicitor, of the Smith Llewelyn Partnership of Swansea, and the adjudication officer was represented by Mr David Forsdick of Counsel, instructed by the Solicitor to the Departments of Social Security and Health. I am grateful to both advocates for their helpful submissions.

2. The claimant appeals, with my leave, against a decision of the Swansea disability appeal tribunal dated 19 January 1994. The claimant was already in receipt of the mobility component of disability living allowance, by virtue of an earlier award of mobility allowance, and the tribunal were considering only whether he might qualify for the care component of disability living allowance. They decided that he did not. Their findings of fact were:-

> "[The claimant] is 57 years of age. He is a Haemophiliac who looks after an 84 year old lady. Until May 1993 he had living with him a Carer who helped look after both the old lady and [the claimant]. The carer died suddenly. [The claimant] is able to manage very well on his own, but he is afraid of using knives and kitchen instruments lest he should cut himself. He admits to being capable of preparing a meal for himself."

Their reasons for decision were:-

"[The claimant] suffers from the distressing complaint of Haemophilia and understandably is nervous in case he should knock or cut himself and thus bleed. He is able to manage all his bodily functions without help and indeed he even looks after a blind 84 year old lady. The only level of Care Component which could be considered is the lowest, but on his own admission he is capable of preparing a meal for himself. He is nervous, but not incapable. He does not satisfy the conditions."

3. At the hearing before me, it was not suggested that the claimant might qualify for the care component on any ground other than satisfaction of the "cooking test" set out in section 72(1)(a)(ii) of the Social Security Contributions and Benefits Act 1992 which provides:-

> "(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 -
>
> (a) he is so severely disabled physically or mentally that -
>
> (i) ....; or
>
> (ii) he cannot prepare a cooked main meal for himself if he has the ingredients;or ...."

4. I granted leave to appeal because I thought it arguable that the tribunal should have made more specific findings as to the care that had to be taken by the claimant and as to whether it was reasonable to expect him to cook if so much care was required. At the same time, I directed the claimant to provide further evidence directed to that issue. I now have a letter dated 16 March 1995 from Mr Jones to which I shall refer in more detail later. Towards the end of the letter, Mr Jones submits:-

> ".... a general application should be the test of reasonableness, i.e., whether [the claimant] cannot reasonably be expected to prepare and cook a meal for himself. The issues of safety, tiredness, pain and time are all evidenced in this submission. [The claimant] conceded at [the] tribunal that he was able to prepare and cook a main meal, but the issue is whether it is reasonable

to expect him to do so. Taking into account all matters, our submission is that eligibility for the lower rate care component is adequately demonstrated."

In a submission dated 1 April 1995, the adjudication officer submits:-

"It is submitted that if a claimant can cook a main meal however much care he needs to exert to achieve this then he does not satisfy the provisions of section 72(1)(a)(ii) of the C&B Act. It may have been clearer to the claimant had the tribunal actually made specific findings as to the care taken and whether this was reasonably to be expected. However this part of the section of the C&B Act unlike the other provisions is not concerned with the need for help. If a claimant can achieve the skills necessary prepare and cook a main meal he cannot satisfy the section. The BAMS report on page 87 stated that in the absence of an associated mental impairment there is no reason why the claimant cannot with care cook for himself. I do not feel that whether it was reasonable to expect him to cook if so much care was required is the point. What is relevant is that with that amount of care the claimant can prepare and cook a main meal."

5. At the hearing, Mr Forsdick resiled in part from the submission of the adjudication officer. He submitted that a person who, taking reasonable precautions, could not prepare a cooked main meal with reasonable safety had realistically to be regarded as a person who "cannot" prepare a cooked main meal. Therefore, he submitted that considerations of "reasonableness" were not irrelevant but he submitted strongly that they had to be confined to the capacity to carry out the functions involved in preparing a cooked main meal and not to wider considerations. For instance, he submitted that it would be relevant that a person who could lift a pan of boiling water could do so only with a substantial risk of scalding himself or herself; in such a case it would not be reasonable to suggest that that person could prepare a cooked main meal. On the other hand, he submitted that it would not be right to take account of the fact that the claimant was employed or had children which might make it reasonable for a claimant to require a meal to be prepared with particular speed. It was not necessary in the context of this particular case that Mr Jones should argue for a broader approach than Mr. Forsdick's.

6. I have come to the conclusion that Mr Forsdick's submissions are right. When one considers the purpose of section 72 of the 1992 Act it is obvious that the legislature

intended that a person should qualify under section 72(1)(a)(ii) if he or she could not reasonably be expected to prepare a cooked main meal due to his or her physical or mental disabilities. Words implying reasonableness are to be implied into section 72(1)(a)(ii) just as they are into section 72(1)(a)(i), (b) and (c) (see Mallinson v. Secretary of State for Social Security [1994] 1 WLR 630). However, as the Commissioner said in CDLA/85/94:-

> "7. ....the 'cooking test' is a hypothetical test to be determined objectively .... [and]
>
> 11. .... 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 ...."

The use of different language in section 72(1)(a)(ii) is, in my view, necessary because the test is hypothetical and that fact necessarily excludes consideration of the realities of the claimant's position. It follows that "reasonableness" is to be judged only in relation to the practicality of the claimant carrying out the hypothetical function. After all, even a fully fit person may, if leading a busy life, reasonably forego "a labour intensive reasonable main daily meal freshly cooked on a traditional cooker" in favour of convenience food cooked in a microwave oven.

7. Mr Forsdick conceded that, if I were to accept his submission as to the scope of the "cooking test", the tribunal's reasons were inadequate for compliance with regulation 26E(5)(b) of the Social Security (Adjudication) Regulations 1986. I agree. It is not clear whether the tribunal did consider whether the claimant could reasonably be expected to prepare a cooked main meal and their findings were not directed to that issue. In particular, they made no findings as to the seriousness of any risk which the claimant might face when cooking. I therefore set aside the tribunal's decision.

8. Both parties invited me to determine this case on the basis of the written evidence before me, which was not challenged by Mr Forsdick. I therefore make the following findings of fact. The claimant suffers not only from haemophilia but also from "episodes of headaches associated with numbness and loss of use of [his] left arm [and] leg". He suffers from some lameness so that his balance is not good and he is uncomfortable when standing. He is a victim of haemophilia A and lacks the

clotting agent Factor VIII in his blood. There is no appropriate daily medication which he can take to control his condition. If he cuts himself or if he suffers an injury causing internal bleeding, he needs to attend a local hospital for a medical check and for the use of Factor VIII if appropriate. Apart from cuts, if he bruises or knocks himself there may be internal bleeding which leads to a drop of blood pressure resulting in obvious lethargy, some disorientation and a gradual loss of consciousness. Such symptoms act as a warning and he is able to act upon them. He is registered as an "at risk patient" at the local hospital and would, on attendance, receive an injection of Factor VIII or be admitted if either course of action was appropriate. Examples of incidents are set out in Mr Jones' letter of 16 March 1995. Some two months before that letter was written, the claimant cut his right thumb, creating a wound of approximately 2cm, and the bleeding was sufficient for him to be admitted to hospital for stitching of the wound and retention as an in-patient for 24 hours. Some two months earlier than that he suffered a knee injury, resulting in swelling, which led to his admission to hospital where he received an injection of Factor VIII and the knee was strapped. Some two months before that he cut himself when using a sharp knife in the kitchen. On that occasion no admission to hospital was necessary. It was only the last mentioned of those incidents that had occurred while he was preparing a meal. When in the kitchen, he has to be careful not to bang his limbs on cupboard doors or kitchen drawers that might have been left open. He needs to take care with all tasks and so most of the tasks he performs take rather longer than would be the case for most people. The time taken to prepare a main cooked meal for himself may be as long as an hour and a half. Not only does he have to take extra care when using sharp knives, vegetable peelers or kitchen scissors, he also has to take care not to burn or scald himself because such injuries may have the same effect as cuts.

9. For the avoidance of doubt, I should say that I am quite satisfied that the claimant does not satisfy the conditions of section 72(1)(a)(i), (b) or (c). There is no evidence that he requires in connection with his bodily functions any attention from another person. There is also no evidence that, in order to avoid substantial danger to himself or others, he requires another person to be awake for a prolonged period or at frequent intervals for the purpose of watching over him at night. Nor, by day, does he require from another person continual supervision throughout the day in order to avoid substantial danger to himself. There is a continual risk of injury but it would not be avoided merely because there was another person supervising him. The serious consequences that might follow

from an injury may be avoided by the claimant himself taking the appropriate action or by his calling for assistance (eg. an ambulance).

10. I turn therefore to the "cooking test". I accept that the claimant must take care when in the kitchen as he must wherever he is. I also accept that the use of sharp implements and hot pans poses an additional risk for him. I also accept that he suffers from some discomfort when standing in the kitchen. However, Mr. Jones accepted that that discomfort was not at the forefront of the claimant's concerns and in my view it ia not sufficiently severe materially to affect the claimant's capacity to prepare a meal. Clearly it takes the claimant rather longer to prepare a meal than it would for most people and clearly also he suffers some anxiety when he does so, but the fact remains that he can and does prepare traditional cooked main meals. To say that he acts unreasonably in doing so would imply that a person in his position acts reasonably only if he or she gives up traditional meals or cooking methods or has someone else cook such meals. It is not unreasonable for a person with a disability to try to pursue as normal a life as possible under the risks involved in carrying out a particular task make it so. I do not think that the additional risk and associated anxiety involved in cooking, over and above the risk attending all the claimant's activities, justifies a finding that it is unreasonable to expect him to prepare a cooked main meal. With proper care, the incidence of injury is not high and the claimant can obtain treatment when injury does occur. I am therefore not satisfied that the claimant satisfies the "cooking test" set out in section 72(1)(a)(ii) of the Act.

11. As the tribunal's decision was technically erroneous in point of law, I must set that decision aside. However, I substitute a decision to precisely the same effect as the tribunal's: the claimant is not, and since the date of claim has not been, entitled to the care component of disability living allowance.

(Signed) M. Rowland
Commissioner

(Date) 24 JUL 1996