

SOCIAL SECURITY AND CHILD SUPPORT COMMISSIONERS

Commissioner's File No.: CDLA/1000/01

Starred Decision No: 118/01

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Any **comments** by interested organisations or individuals on the suitability of this decision for reporting should be sent to:

Ms Kimberli Jones,
Office of the Social Security and Child Support Commissioners,
5th Floor, Newspaper House, 8-16 Great New Street, London EC4A 3BN.

so as to arrive by 11th January 2002

Comments on Northern Ireland Commissioners' decisions will be forwarded to the Northern Ireland Chief Commissioner.

Decision:

1. My decision is as follows. It is given under section 14(8)(b) of the Social Security Act 1998.
- 1.1. The decision of the North Shields appeal tribunal, held on 12th December 2000, is erroneous in point of law.
- 1.2. I set it aside and remit the case to a differently constituted appeal tribunal.
- 1.3. I direct that appeal tribunal to conduct a complete rehearing of the issues that arise for decision.

The appeal to the Commissioner

2. This is an appeal to a Commissioner against the decision of the appeal tribunal brought by the claimant with the leave of a district chairman. The Secretary of State supports the appeal.

The history of the case

3. The claimant was awarded a disability living allowance consisting of the mobility component at the higher rate from and including 7th March 1994.
4. In 1997, he applied for a review with a view to the care component being included in the award. A factual report was obtained from his GP and the care component was awarded at the lower rate from and including 21st September 1997.
5. In January 2000, the claimant hoped that the award of the care component might be increased to a higher rate. The review and revision procedures had by this time been repealed. So, he requested a supersession under the new adjudication procedures and completed a claim pack. A hospital report was obtained and the Secretary of State decided that the claimant was not entitled to the care component from and including 24th March 2000, the date of the hospital report.
6. The claimant appealed against that decision to an appeal tribunal. The first hearing of the appeal was adjourned for a report to be obtained from an examining medical practitioner. The claimant was warned that the mobility component might be removed by the appeal tribunal. At the resumed hearing on 12th December 2000, the tribunal reinstated the care component at the lowest rate until 23rd March 2003, but terminated the award of the mobility component from and including the date of the hearing.

Special protection for life awards

7. The award of the mobility component that was terminated by the appeal tribunal was made for life. Under the review and revision provisions in the Social Security Administration Act 1992, there was special protection for life awards: see sections 32(4) and 3(6). Those

provisions were repealed by the Social Security Act 1998 and there is no equivalent in the revision and supersession provisions.

8. The claimant's representative argues that the claimant remains entitled to the protection for his life award. I reject that argument. It can only be based on section 16(1)(c) of the Interpretation Act 1978. That provision gives way to a contrary intention. I find a contrary intention in the case of the special protection for life awards.

8.1. First, although it was additional to the need to show grounds for review, it was an integral part of the review and revision provisions: see the decision of Mr Commissioner Mesher in *CDLA/7482/1999, paragraph 26*. There can be no doubt that the review and revision provisions do not survive so as to apply in this case. So, it can hardly be that an integral part of them does survive.

8.2. Second, there is no reference to it in the transitional provisions that governed the change to the new adjudication procedures. It would be surprising if it were to survive, despite not being mentioned in those detailed provisions. This is especially so, given its close connection with the review and revision procedures, which clearly do not survive.

Section 12(8) of the Social Security Act

9. Section 12(8) contains two provisions that are relevant to this case.

'In deciding an appeal under this section, an appeal tribunal-

- (a) need not consider any issue that is not raised by the appeal; and
- (b) shall not take into account any circumstances not obtaining at the time when the decision appealed against was made.'

Section 12(8)(a)

10. The mobility component had not been considered by the Secretary of State in the decision under appeal. Nor was it mentioned in the claimant's letter of appeal. However, the tribunal dealt with it on its own initiative. That raises two questions. Was the claimant's entitlement to the mobility component 'raised by the appeal'? If it was, did the tribunal properly exercise its discretion to deal with it?

11. *Was entitlement to the mobility component raised by the appeal?* I refrain from attempting a comprehensive definition of 'raised by the appeal' beyond saying that this question is not determined just by the wording of the letter of appeal. It must be answered by reference to the substance of the appeal. The claimant had completed a claim pack in January 2000. In that pack, he attributed his difficulties to epilepsy, arthritis, peripheral neuropathy and pernicious anaemia. His account of his mobility difficulties showed that they were related to his arthritis and, possibly, also to his peripheral neuropathy. His account of his care needs showed that some, although not all, were also related to those conditions. So, it was impossible for the tribunal to consider the care component without also considering the basis of the award of the mobility component. The two were inseparable. In those circumstances, the claimant's entitlement to the mobility component was raised by the appeal.

12. *Did the tribunal exercise its discretion properly?* I have dealt with this question in relation to this provision and its equivalent in the Child Support Act 1991 in two decisions: *CI/531/2000, paragraphs 10 to 14* and *CCS/463/2000, paragraphs 15 to 24*. I made four points that are relevant to this case: (a) section 12(8)(a) conferred a discretion; (b) it had to be exercised judicially; (c) an exercise that was in breach of natural justice was not judicial; (d) natural justice required that a claimant have notice that a point was to be considered and a chance to deal with it.

13. In this case, the claimant was warned that his award of the mobility component might be at risk. At the resumed hearing, the claimant's representative challenged the tribunal's right and power to consider the mobility component. So, there was no breach of natural justice. The tribunal was entitled to exercise its discretion to consider entitlement to the mobility component.

Section 12(8)(b)

14. Under the adjudication scheme in the Social Security Administration Act 1992, tribunals often took a practical approach to the termination of awards. If there was no question of any overpayment being recoverable, it was common for a tribunal to base its decision on a supposed change of circumstances that occurred on the date of the hearing. That was, of course, a fiction, but it was a convenient approach. It saved the tribunal from investigating unnecessary details, especially as the claimant was unlikely to provide information to assist its inquiries.

15. That was obviously the approach that was taken by the tribunal in this case. I directed the Secretary of State to make observations on the question whether it could be reconciled with section 12(8)(b). The Secretary of State submits that it cannot. The claimant's representative does not comment directly on the issue.

16. I accept the Secretary of State's submission. If there really was a change of circumstances on the date of the hearing, it was a circumstance that was not obtaining at the date of the decision under appeal; it was outside the tribunal's jurisdiction. If there was a circumstance obtaining at the date of the appeal over which the tribunal had jurisdiction, the effective date of the termination of the award had to be fixed under regulation 7 of the Social Security and Child Support (Decisions and Appeals) Regulations 1999; it could not be the date of the hearing.

17. I regret this conclusion. The approach taken by the tribunal was a convenient one. Unfortunately, it cannot be reconciled with the limitations on the tribunal's jurisdiction that is imposed by section 12(8)(b).

Summary

18. The decision of the appeal tribunal is wrong in law and must be set aside. Further investigation of the facts is needed and a rehearing is appropriate so that that can be undertaken by experienced panel members. I make no comment on the merits of the appeal; they are a matter for the tribunal to determine at the rehearing.

19. To avoid any misunderstanding, I make this final point. The whole of the claimant's entitlement to a disability living allowance is open for consideration at the rehearing. That

includes the award of the care component at the lowest rate that was made by the tribunal on 12th December 2000. That award is not 'in the bank' and may not be repeated at the rehearing.

Signed on original

**Edward Jacobs
Commissioner
18th September 2001**