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CDLA/1290/2004

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. I allow the claimant's appeal. I set aside the decision of the Stockport appeal tribunal dated 8 January 2004 and I refer the case to a differently constituted appeal tribunal for determination. I draw both parties' attention to my suggestions in paragraph 12.

REASONS

2. The claimant was entitled to the higher rate of the mobility component and the middle rate of the care component of disability living allowance until 8 January 2002 but payment continued in error until 5 March 2003. When payment ceased, she made a new claim and the lowest rate of the care component was awarded from 15 April 2003 to 14 April 2005. The claimant appealed. There was included in the case papers a report from the claimant's doctor dated 24 October 2003. On the day of the hearing, her representative faxed a letter to the Appeals Service, making a number of points about the Secretary of State's submission to the tribunal and asking for the hearing to be postponed so that the Secretary of State could comment on those points or, alternatively, for the previous award to be reinstated on the basis of the material in the papers. The clerk to the tribunal telephoned the representative saying that the request for a postponement had been refused and asking the representative and the claimant to attend that afternoon. The representative responded with another fax, stating that the claimant was not at home and that, as he was unable to give evidence and had made his submissions in writing, he would not be attending. The tribunal decided to hear the appeal in the claimant's absence and dismissed it.

3. The claimant asked for the decision to be set aside on the ground that she had not attended the hearing because she had not felt it appropriate to do so without the Secretary of State's explanation for benefit having been paid in error or some further evidence she was seeking and that a further doctor's letter dated 30 October 2003 had not been before the tribunal. The chairman declined to set the tribunal's decision aside on the ground that the claimant and her representative had chosen not to attend the hearing and that the letter of 30 October 2003 did not add anything to the letter of 24 October 2003. He subsequently refused leave to appeal on the ground that the application was out of time. The claimant now appeals against the tribunal's decision with my leave. When granting leave, I commented that the chairman appeared to have overlooked the effect of regulation 57A(1) of the Social Security and Child Support (Decisions and Appeals) Regulations 1999 when deciding that the application to him had been late.

4. The only ground upon which I granted leave to appeal was that I considered it to be arguable that there was a breach of the rules of natural justice in the doctor's letter of 30 October 2003 not having been before the tribunal, because it seemed to me that, contrary to the chairman's view on the set-aside application, it did add to the letter of 24 October 2003. In particular, whereas the earlier letter had merely mentioned that the claimant walked with a frame, the second said her walking distance was "only about 20-30 yards". The Secretary of State's representative concedes that the point is arguable but does not come down off the fence and make a positive submission one way or the other as to whether there actually was a breach of the rules of natural justice or of Article 6 of the European Convention on Human Rights to which she refers. With some hesitation, I find that there was. My hesitation is due

to two factors. The first is that the letter did not refer to the claimant's appeal and so it may not be very surprising that it was not put before the tribunal if it was not linked to the claimant's file until after the documents were sent by the Department for Work and Pensions to the Appeals Service. (Although the claimant said a copy of the letter was sent direct to the Appeals Service, it seems more likely that it was sent to the Department, as her representative states.) Secondly, and more importantly, the claimant and her representative did have the opportunity of noticing that the letter had not been included among the documents before the tribunal because they were sent a copy of the tribunal bundle. However, I accept that the claimant's English literacy is not good. There is also some explanation for the representative having overlooked the document's absence from the bundle. He was not sent a copy independently and he was given the claimant's bundle when he saw her only two days before the hearing and would in any event not have expected the document to be in the main bundle if it had been sent to the tribunal as further evidence. Moreover, as the Secretary of State points out, the faxed submission to the tribunal referred to both letters from the doctor and so the tribunal also had an opportunity to notice the absence of the document and failed to do so. The letter might have made a difference to the outcome of the hearing and I am prepared to allow the appeal. I note that a recent opinion from a consultant physician also says that the claimant can walk only 30 yards.

5. The claimant's other grounds of appeal have no substance whatsoever. Her representative is very exercised about the previous award. However, the documents relating to that had been destroyed, possibly because there had been no renewal claim. The tribunal referred to the destruction of the documents and the implication is that that is the reason why they were unable to make any comment on the award or on the claimant's contention that her condition had not improved since it was made. That is a perfectly adequate explanation and I fail to see what the claimant's representative thinks might have been gained by making a further request to the Department for information. Had he turned up for the hearing, he would have discovered that there was a presenting officer present who would no doubt have been able to explain the limitations of the Department's record keeping. Whatever criticisms can be made of that record keeping, the fact of the matter is that, once documents have been destroyed, neither the Department nor a tribunal can invent evidence to replace them.

6. Indeed, the faxed request for an adjournment was altogether misconceived. What advantage was the claimant to gain by the Department being able to answer her representative's arguments as to the relevance of the previous award, the overpayment, the destruction of documents, the inability of the examining medical practitioner to speak the claimant's language and the other matters he raised ? Anyway, as I have already said, it happens that there was a presenting officer at the hearing who could have responded to the points.

7. In relation to the overpayment, no-one had suggested that the claimant acted dishonestly in continuing to receive payments of disability allowance after the period of the award had ended. It had been explained that the payments were made with payments of other benefits and, even if the claimant's English had been perfect and she had remembered that the initial award had been made for a period of only three years, she could have been forgiven for thinking the Department knew what they were doing and had extended the award. There is no evidence that she had had any experience of having to make a renewal claim. However, the statement that she had continued receiving payment in error was relevant because it explained the gap in entitlement and made it clear that the decision-maker in 1999 had not made a

decision that included any sort of implication that he considered that the claimant would still be entitled to benefit in 2003. Because it was relevant, the Secretary of State was right to include it in the submission to the tribunal. It did not carry the implication of dishonesty that the claimant's representative has suggested.

8. In relation to the examining medical practitioner's ability to communicate with the claimant, it can be inferred from the history taken that there was a considerable degree of communication. If the claimant's evidence is that some of her answers were misconstrued or based on a misunderstanding of the question, she could, had she attended the hearing, have given evidence to that effect and the tribunal could have taken that evidence into account in considering what weight to give the record of the history and to any opinion of the examining medical practitioner based on it. If necessary a new report could have been commissioned. However, a tribunal is not required to disregard a medical report on the basis of an unparticularised allegation that there was difficulty in communicating and they will generally be entitled to hear evidence from the claimant before deciding whether to accept such a criticism of a report. That was another reason why it was important for the claimant to attend the hearing.

9. In my view, the tribunal were plainly right to refuse the adjournment and neither the claimant nor her representative should have presumed that it would be granted. The representative may not have said to the clerk that he actually wanted the tribunal to proceed in his absence but the clear implication of his first fax and his behaviour was that, if the adjournment was refused, he was content for them to do so. Contrary to the submission of the Secretary of State, the tribunal afforded the claimant a perfectly adequate opportunity of attending a hearing. I do not accept the claimant's representative's distinction between choosing not to attend and not attending for good cause. There is a choice in both cases, whether or not the reason is good or, as I find in this case, bad.

10. I have some sympathy for claimants who opt for paper hearings without realising the advantages of attending an oral hearing. I have great difficulty in understanding representatives who appear not to take adequate steps to warn claimants that applications for postponements may not be successful and that they should be ready to attend a hearing if necessary and who then devote great effort to pursuing the case on appeal. If there was any merit in this claimant's case – and on the papers it appears to have quite a lot – I cannot see how her interests could possibly have been served by her not attending the hearing if the postponement was not granted. Her health seems generally to have been fairly poor and it may be that she would have required some persuasion but it seems to me that giving that kind of advice and support is a proper role for a representative. Getting all the evidence before the tribunal and making submissions as to its significance is generally far more important than arguing points of procedural law. Indeed, to put as one's first submission an argument as to the reasons a tribunal should give if they make an adverse decision is surely unwise. It must be better first to try to persuade a tribunal not to make an adverse decision at all.

11. Both parties submit that the tribunal erred in failing to deal with certain aspects of the evidence. The Secretary of State's submission is not accompanied by any suggestion as to why those parts of the evidence do not satisfy him of the claimant's entitlement to more benefit. The claimant's representative's submission is not accompanied by any recognition that his presence at the hearing might have led to those points being given greater prominence and that his client's presence would have furnished the tribunal with better evidence.

12. I do not accept the Secretary of State's submission that the tribunal ignored the claimant's evidence. They were entitled to comment that they were unable to probe her evidence by questioning her and they were entitled to prefer the examining medical practitioner's evidence where there was a conflict, although the number of issues on which there was a direct conflict was limited. I am also at a loss to understand the Secretary of State's submission that the tribunal did not consider the examining medical practitioner's report in relation to falls and an inability to maintain hygiene. A whole paragraph of the statement of reasons is devoted to considering the risk of falling. As to the claimant's mental health, which was obviously a matter of concern to the examining medical practitioner – and indeed to another examining medical practitioner who had found the claimant to be "a very frightened woman" (page 43) and had declined to examine her without someone else being present – the tribunal's view was that they were not prepared to find that the claimant was suffering from mental disablement without a clear diagnosis. That seems to me to be an adequate explanation for their decision. A specific diagnosis may not be required as a matter of law but a tribunal are entitled to take the view that they are not satisfied that the claimant is suffering from mental disablement in a case where there is no diagnosis. Had the claimant not been represented, it might well have been appropriate for them to adjourn to obtain more evidence on the point, but the representative had not relied on the claimant's mental health in his submission and so the tribunal were not obliged to take the matter further.

13. The claimant's representative's arguments are similar to the Secretary of State's and no more compelling. A chairman is not required to refer to every piece of evidence in the statement of reasons. In relation to the night-time needs found by the examining medical practitioner, it seems fairly obvious that the reason no reference was made to them in the statement of reasons was that the claimant was found to have those needs only on a small proportion of nights. I note that this is another part of the evidence that had not featured in the claimant's representative's submission to the tribunal, doubtless for the same reason.

14. In my judgment, given the evidence before them and the submissions made to them, the tribunal's reasoning was adequate. If it were not for the tribunal having been unaware of the doctor's report of 30 October 2003, I would dismiss this appeal.

15. The claimant's representative asks me to substitute my own decision for that of the tribunal. Although, as I have indicated, there is some quite strong evidence in favour of the claimant, I take the view that this is a case that should be considered by a tribunal, unless the Secretary of State is minded to concede it in the light of both the new evidence produced since he last considered the case and his representative's criticism of the tribunal's reasoning which might equally apply to his own reasoning on the original award and "reconsideration". Even if the reasoning is not wrong in law, there may be some force in the implied suggestion that more weight could have been given to some factors than was apparently given. Meanwhile, the claimant's representative might like to consider obtaining a medical opinion as to his client's mental health, if that is to be an issue in the case. If the Secretary of State does not concede the case, the tribunal would no doubt be helped by a written submission explaining what his position is in the light of the current evidence.

MARK ROWLAND
Commissioner
1 October 2004