Simon

DLA
/14/94/96

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10 March 1999

Please find enclosed an unreported commissioners decision which you may wish to publicise. This case was eventually successful following a domiciliary hearing awarding DLA both higher care and higher mobility backdated for a four and half year period.

I think paragraph 8 is interesting with Commissioner Heggs implying that the main meal test may well be satisfied if the claimant can only prepare such a meal slowly and by installments. Is this a new precedent?

Please give me ring if you think it is precedent. Note that I am leaving the Unit to take another post on 15/3/99 but my colleagues will be able to give you a contact number if you need to speak to me.

Yours faithfully

A Jabbar

Amjid Jabbar
Welfare Rights Consultancy Worker

Acknowledged 30/3/99

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Coding Test – Assumed Reasonable Speed

RFHR/CW/5

Commissioner's File: CDLA/14594/1996

SOCIAL SECURITY ADMINISTRATION ACT 1992

SOCIAL SECURITY CONTRIBUTIONS AND BENEFITS ACT 1992

APPEAL FROM DECISION OF A DISABILITY APPEAL TRIBUNAL ON A QUESTION OF LAW

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Name: Valerie Power

Disability Appeal Tribunal: Nottingham

Case No: D-31-061-95-0014

1. My decision is that the decision of the disability appeal tribunal (DAT) given on 16 August 1995 is erroneous in point of law and accordingly I set it aside. The claimant's case is referred to another DAT for reconsideration.

2. This is the claimant's appeal against the decision of the DAT of 16 August 1995, leave having been granted by me.

3. On 17 August 1994 the claimant claimed disability living allowance. The adjudication officer rejected the claim to the mobility component. The claimant did not identify any care needs. The claimant applied for a review. There was a review. The decision was not revised. There was an appeal to the DAT on behalf of the claimant.

4. The claimant attended the hearing of the appeal for the DAT on 16 August 1995. In the event the DAT dismissed the appeal. The findings of fact so far as relevant read:-

> "The appellant can walk for distances in excess of 100 yards though she might well have to stop once during that distance. She experiences pain in the back and left leg and hip.."

The reasons for decision read:-

> "In order to satisfy the conditions for the Mobility Allowance the Appellant must show she is virtually unable to walk... In this case it has been difficult to establish with the Appellant how far she can walk before she has to stop and before she experiences severe

discomfort. The Tribunal has therefore had to approach the matter from a somewhat different angle and to consider how much walking the appellant does in order to decide the degree of discomfort which she experiences.."

5. The issue before the DAT was whether the claimant satisfied the conditions of entitlement for an award of the care component, if the evidence indicated that she had care needs and/or mobility component of disability living allowance as provided by section 72 and 73 of the Social Security Contributions & Benefits Act 1992 (The Act).

6. It is submitted on behalf of the claimant that the DAT's decision was inadequate and failed to comply with the requirements of regulation 29(5)(b) of the Social Security (Adjudication) Regulation 1995 because they failed to consider any entitlement to the lower rate of the mobility component or to any rate of the care component. I agree. The decision was erroneous in law and I have no alternative but to set it aside.

7. The adjudication officer submits that it was not incumbent on the DAT to consider any rate of the care component because on the claim form the claimant ticked a box replying "no" to the question "do you want to claim disability allowance for help with personal care?". In addition appeal papers appeared to show that she was only concerned with the mobility component. I reject this submission. The claimant's statements and her grounds of appeal showed that she had care needs. Although she replied "no" in the claim form she went on to say "left hip.. locks on occasion which causes pain and discomfort. If my hip has "locked" it takes longer for me to manipulate a position to get out of bed"; I have to lie on my back to get tights or stockings on; in a letter received on 21 September 1994 she referred to "a long battle against pain and depression", in a letter dated 27 September 1994 she said" I cook meals in easy stages, for example, cut up the vegetables and then go and sit down, deal with the meat, then go and sit down, etc..". In those circumstances it was incumbent on the DAT to consider the claimant's entitlement to the care component. (see decision CDLA/21/94).

8. It is contended on behalf of the claimant that she was entitled to the care component at the lowest rate because she satisfied the conditions of entitlement contained in section 72(1)(a) of the Act. With regard to paragraph (a)(i) the new DAT should have before them decision CDLA/58/93 for guidance on the interpretation of "a significant portion of the day". With regard to paragraph (a)(ii) they should have before them CDLA/85/94 in which I give guidance on the interpretation of "cannot prepare a cooked main meal for himself". If the claimant in the present case can only prepare such a meal slowly and by instalments as described by her, it may be that she satisfies the conditions of entitlement. The test

requires a claimant to prepare such a meal at a reasonable speed.

9. It is not contended that the claimant satisfied the conditions of section 72(1)(b) or (c) of the Act. However the new DAT should confirm that this is in fact the position, because there was evidence before the DAT that the claimant suffered from severe depression which was exacerbated by the pain in her spine and the treatment she received for breast cancer. The claimant does not indicate whether her severe depression affected other activities or aspects of her life.

10. In their reasons for decision the DAT referred to the claimant's entitlement to mobility allowance. This was replaced by the mobility component from 6 April 1992. Although this might have been a "slip of the pen" and the conditions of entitlement to the higher rate of the mobility component are similar, nevertheless the DAT were erroneous in law because they failed to consider the entitlement to the lower rate of the mobility component.

11. The claimant contended she was virtually unable to walk in terms of section 73(1)(a) of the Act. Regulation 12(1)(a)(ii) of the Social Security (Disability Living Allowance) Regulations 1991 ("The Regulations") sets out the circumstances of which a person may be found to be virtually unable to walk for the purposes of section 73(I)(a). That regulation clearly imports that a person suffering from a physical disablement may be found to be virtually incapable of walking if ability to walk out of doors is limited in one or more of the ways mentioned in that regulation in making progress on foot without severe discomfort. The effect of pain and breathlessness on the claimant's walking ability specifically in issue in this case.

12. The claimant's evidence was that "the pain I get from my back since I had an operation to remove a disc is getting progressively worse"; "I am in constant pain, both sitting and standing"; "I cannot stand upright for longer than 3 minutes"; she sometimes had to sit down on the pavement because it was too painful for her to walk. The tribunal found as fact that the claimant could walk "in excess of 100 yards though she might have to stop once during that distance". However they failed to consider how long the claimant would need to stop and rest before she was able to continue and how long it would take her to cover this distance. They also failed to consider the nature of the discomfort which would force her to stop. The claimant is left in the dark as to why evidence was rejected.

13. As stated the claimant suffered from severe depression. The new tribunal should have regard to section 73(1)(d) of the Act. It should be noted that the provision is limited to people who need guidance or supervision to reach a destination

by an unknown route. The new DAT should have regard to Decision CDLA/42/94, with particular reference to paragraph 22, which gives guidance on the interpretation of "guidance or supervision".

14. For the reasons stated above the DAT's decision was erroneous in law. The new DAT should have regard to all issues afresh and ensure that their decision complies with the statutory requirements. It seems that the claimant has never been examined by a medical officer. I consider it would be helpful if such an examination could take place before the hearing of the appeal before the new DAT. The claimant will of course be at liberty to submit further medical evidence should she wish to do so.

15. The claimant's appeal is allowed.

(Signed) R F M HEGGS
Commissioner

(Date) 5 August 1997