Dellehi 155 (Cont'd)

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. My decision is given under section 14(8)(b) of the Social Security Act 1998. It is:

I SET ASIDE the decision of the Stevenage appeal tribunal, held on 4 February 2005 under reference U/42/038/2004/03046, because it is erroneous in point of law.

I REMIT the case to a differently constituted appeal tribunal and DIRECT as follows.

The appeal tribunal must investigate and determine the claimant's entitlement to a disability living allowance on and from 16 September 2004, the date of his claim for an allowance. In doing so:

The appeal tribunal must conduct a complete rehearing of the issues that are raised by the appeal and, subject to the tribunal's discretion under section 12(8)(a) of the 1998 Act, any other issues that merit consideration.

The appeal tribunal must not take account of circumstances that were not obtaining during the period from the date of claim to the date of the decision under appeal (25 November 2004): see section 12(8)(b) of the Social Security Act 1998. Later evidence is admissible, provided that it relates to the time of the decision: *R(DLA) 2 and 3/01*.

I encourage the claimant to attend an oral hearing of his appeal. Even if his representative cannot attend, he will be able to assist the tribunal by answering questions about his disablement and his needs.

History

The claim

2. The claimant made a claim for a disability living allowance on 16 September 2004. The Secretary of State obtained factual reports from the claimant's GP and Consultant Psychiatrist as well as advice from a medical adviser. The decision-maker then refused the claim.

The appeal

3. The claimant exercised his right of appeal to an appeal tribunal. His representative did not attend the hearing, but provided a written submission for the appeal tribunal:

> This appeal relates to a new claim for DLA made on 16 September 2004. The decision to refuse an award of benefit was made on 25 November 2004. [The claimant] has elected not to attend the hearing of his appeal.
>
> In the claim pack [the claimant] says that when he goes outside he is overwhelmed by feelings of fear and panic. He says that he hears voices in his head that tell him to do things such as jump under a passing bus. [The claimant] adds that he feels people are watching him and says that he often becomes verbally aggressive towards people. [The

claimant] adds that he falls as his leg gives way without warning and then he struggles to get up. During the day [the claimant] says that he suffers from feelings of fear and anxiety and is forgetful and lacks concentration. He says that he needs encouragement to keep his flat tidy, to get out of bed, to tend to his personal hygiene and to change his clothes. [The claimant] says that he has no interest in planning a meal and that his appetite is poor. He says that he forgets to take his medication and adds that the voices tell him to do things to cause injury or death and that he has a history of self-harm. During the night [the claimant] says that the voices talk to him and won't let him get to sleep.

The decision-maker approached the claimant's GP for information. Dr Singh says that [the claimant] has depression, is under the care of a psychiatrist and that a recent letter suggests that [the claimant] did not have schizophrenia. The depression is described as moderate and Dr Singh says that information on self care and mobility is not available.

We note from document 48 that [the claimant] has been prescribed carbamazepine. As we understand it, this particular medication is used for the treatment of manic-depressive illnesses where patients have rapid cycling manic-depressive illness. Similarly manerix is used to treat major depression. Side-effects of manerix include sleep disturbances, dizzyness, agitation and confusion. We were somewhat surprised that the GP described the depression as "moderate" given that he has prescribed medication for "major" depression.

Document 50 appears to be advice from medical services although the reason for the referral is unclear. The advice totally ignores the claimant's mental health problems. We therefore assume that this was the reason for the decision-maker seeking a report from the claimant's psychiatrist.

Dr Meakin gives a diagnosis of depression. He says that [the claimant] likes to be alone and that self care is reasonable as far as I am aware. Similarly Dr Meakin says that [the claimant] would not neglect himself as far as he is aware, noting that [the claimant] says that he relies on his sister to support him. Dr Meakin does confirm that [the claimant] sometimes loses his temper and hurt himself when he punched a window. Dr Meakin feels that [the claimant] is capable of being unsupervised and that [the claimant] is largely on his own but relies on his sister to visit.

The decision at page 60 is short and argues that [the claimant] can be left safely alone, that he can do all tasks to prepare a meal and that he is not virtually unable to walk or unable to walk safely and alone.

The appeal request emphasises that [the claimant] hears voices and gets confused and that he needs someone to look after him outside and inside. The appeal asks if the medical professionals were asked all the questions answered on the claim form or if they were sent a copy of the claim forms.

The decision-maker misquotes these grounds at page D of the submission. The decision-maker responds that the authors of the reports are aware of [the claimant]'s disabilities and how they affect his walking and care needs.

But are they? Were the medical professionals asked all relevant questions? Perhaps the decision-maker should look at his own guidance on medical reports. Here it says:

"51.3.1 General Practitioner Factual Reports (GPFRs)

(i) A special fee payable to individual GPs has been agreed whereby factual information based on a patient's clinical records will be provided.

The fee does not extend to the provision of an opinion and so, unless the information is already contained within the clinical records, the GP will not be in a position to provide it.

It has to be understood that individual entries in a patient's clinical record are relatively brief and will usually concentrate on diagnosis, clinical findings and treatment plan.

The records will not really contain any meaningful information relating to care and mobility needs. In general therefore GPFRs can provide useful information on the diagnosis and overall severity of a person's disabling conditions. It will not usually be appropriate to ask specific questions about the help a person requires unless there appears to be gross under-or over-representation of those in the claim pack."

So guidance to decision-makers argues that GP reports do not contain any meaningful information. But did the decision maker ask all the right questions? Well Dr Singh was certainly not asked about the ability to prepare a meal, any lack of motivation or any need for guidance or supervision when outdoors. The decision-maker also failed to ask Dr Meakin about these matters. Most importantly neither report asks the medical professionals the obvious question; "Does [the claimant] hear voices that tell him to self harm?"

DLA is a self-assessment benefit. The claimant needs to establish that he has a severe physical or mental disability. Whether the claimant's disability should be regarded as severe seems to be a function of the need that is shown for care. We contend that the claimant can show that he has a severe mental disability.

The onus is on the claimant to demonstrate that he qualifies for this Allowance. It is not necessary for him to medically his case [sic]. He needs to show that he requires guidance or supervision when outdoors, that he reasonably requires attention or that he requires continual supervision. He has completed a detailed claim pack and we contend that he has discharged the burden of proof.

We would also remind the Tribunal that it has been accepted that giving support and encouragement to someone who is severely disabled by phobias, depression and paranoid illnesses has been held to be attention in connection with bodily functions.

With regard to the cooking test we note CSDLA/80/96 where the Commissioner notes:

"Equally, I consider if it could be shown what the lack of motivation resulted in, by way of preventing the same preparation, then the test might be satisfied. The relevant questions concern whether the psycho-neurosis induced lack of motivation prevented

this claimant from even approaching the provided ingredients or, for example, having done the preparation whether his motivation tended to lag and fail so that the ingredients would never be cooked. I think a determination about any such link is of critical importance."

Turning to the mobility component we do not propose to argue that the claimant is virtually unable to walk. We would argue that the claimant does need guidance and supervision most of the time.

We would refer to CDLA/4438/2003 where the Commissioner comments: "It is true that the mere fact that a claimant derives reassurance from another person does not mean that that person is providing guidance or supervision but the point was made in CDLA/42/94, at paragraph 22(1), that it is equally true that the fact that a claimant derives reassurance from another person does not mean that that other person is not providing guidance or supervision."

CDLA/42/94 reminds us that guidance means directing or leading and may be constituted by oral direction, persuasion or suggestion. Supervision means accompanying the claimant and at least monitoring the claimant for signs of a need to intervene so as to prevent the claimant's ability to take advantage of the faculty of walking being compromised. The Commissioner goes on to argue that the monitoring does not cease to fall within the meaning of supervision by reason only that intervention by the person accompanying the claimant has not in the past actually been necessary.

The decision

4. The tribunal dismissed the claimant's appeal and the chairman provided a full statement of the tribunal's decision. The first paragraph contains the tribunal's decision. The reasoning is as follows:

The Hearing

2. [The claimant] is represented by a limited company ... . It is their common practice of which I have experience that a hearing on the papers is invariably requested. In certain other appeals where the appellant has been represented by this company and I have acted as chairman of the Appeal Tribunal the Tribunal has directed an oral hearing. Typically the company sends in the submission analysing the evidence in the papers and invites the Tribunal to agree with that submission. On the last appeal I dealt with where this company was representing and an oral hearing was directed, the appellant advised the Tribunal that a third of any backdated award of Disability Living Allowance is paid to the company. The company therefore works on a contingency fee basis. I find it difficult to understand the reason for the representative requesting a paper hearing as statistically an appellant has the best chance of success by attending an oral hearing. The Tribunal has to consider what is fair and just to an appellant, not necessarily agreeing with the position taken by representative.

3. The tribunal did consider whether to adjourn for an oral hearing but considered the evidence in the papers to be sufficient for it to come to the decision. In coming to that

decision it does not interpret the evidence as the representative company has done in their submission.

Findings of Fact

4. [The claimant] is aged 46 years. He made a claim to disability living allowance on 16 September 2004. He suffers from depression, mixed lipoedemia and a laceration to the right thumb. The laceration to the right thumb and the lipoedemia being high cholesterol do not cause him any disability that would entitle him to an award of DLA.

5. He is under the care of a psychiatrist for his depression since February 2002. His depression is moderate. The medication he has been prescribed treats the depression. His depression is longstanding as he has had periods of outpatient care since 1989. He suffers periodically from low mood and tension. He sometimes loses his temper. [The claimant] prefers to be alone as he is intolerant of others. His self-care is reasonable. He does not neglect himself. His sister supports him. in 2003 he punched a window in. He is capable of being left unsupervised without any risk of self harm or danger to others.

6. On 25 November 2004 a decision was made refusing DLA to [the claimant].

Reasons for the Decision

7. The submission rightly examines how the depression gives entitlement to DLA, ignoring the other two conditions. The Tribunal in making its findings of fact relies on the report from [the claimant]'s GP and from his psychiatrist. At document 15 in response to the question, who would you like to tell us about your illnesses or disabilities? [the claimant] has named his GP. The representative argues that the report from the GP is unreliable as it will be based on relatively brief entries in the patient's clinical records. The Tribunal finds this particular submission to be slightly disingenuous as the representative assisted the appellant in filling in the form and must have agreed with his statement that his GP was that person to contact regarding his illness or disabilities. The Tribunal does not agree that his GP will not know his patient or that the records are sparse in information. The GP has written to certain answers N/A meaning not applicable. The Tribunal would be reluctant to rely on such an answer as indicating there were problems in the areas marked N/A.

8. Fortunately the Tribunal has the report of the psychiatrist who has been treating [the claimant] for some time. The psychiatrist's report is more detailed and confirms that no injury or change has occurred even though [the claimant] is on his own most of the day. His low mood and tension leads him to avoid contact with people, but this does not equate to a need for guidance or supervision when walking out of doors. The psychiatrist states that he prefers to be alone as he is intolerant of people indicating this is a personal choice rather than the condition forced upon him by his depression he recognises he does not like being with people so avoid some. DLA is not a benefit designed to assist the socialisation of a person. Based on the psychiatrist's report the Tribunal does not find that he is at risk such that he needs continual supervision throughout the day to avoid substantial danger to himself or others. There is a report of [the claimant] putting his hand through a window. There are no other such reports. The psychiatrist would have reported episodes of deliberate self harm or other incidents if

they were known. The depression is described as moderate by his GP and the psychiatrist states he does not neglect himself if left alone. The psychiatrist's evidence is that he is able to look after himself such that he does not neglect himself; by implication if he was neglecting himself it is likely that he would not be able to cook a main meal for himself. But this is not the case, as he does not neglect himself. The tribunal does not accept the submission based on its own analysis of the medical evidence.

The application for leave

5. The claimant, through his representative, applied for leave to appeal to a Commissioner. The grounds of appeal were that (a) the chairman's comments in paragraph 2 of her statement show that she or the tribunal was biased against the representative and (b) the tribunal had been wrong to say that disability living allowance was 'not a benefit designed to assist the socialisation of a person.' The application was referred to and refused by the tribunal's chairman. She wrote:

> 1. The passage in the Bench Book is not familiar to me.
>
> 2. By the representative's practice of advising a client to seek a hearing on the papers the tribunal in the interests of justice has to consider whether to adjourn for an oral hearing. In other appeals where the representative is [this company] adjournments have been directed for an oral hearing and appearance by the appellant.
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> 3. By the representative adopting this practice the tribunal has to consider all appeals firstly on the papers. Adjournments cause delay, are costly and oral hearings offer a better chance of success to the appellant. The statement deals with these issues as the tribunal had to consider whether to adjourn for an oral hearing. The reasons why it did not do so are explained in the statement. I cannot see how those reasons or the tribunal's actions show bias against the representative.

6. The application was renewed to the Commissioner and referred to the Chief Commissioner. He granted leave and gave these reasons and directions;

REASONS

It is at least arguable that the tribunal erred in (i) taking into account the nature of the relationship between the claimant and his representative and (ii) proceeding on the basis that "DLA is not a benefit designed to assist the socialisation of a person".

DIRECTIONS

I direct the parties simultaneously to submit written observations on the appeal within one month of these directions being issued. In particular, in relation to ground (i) above, they are asked to make observations on (a) whether it is appropriate for a tribunal to take into account the relationship between a claimant and his representative per se; (b) whether the terms of such a relationship are confidential to the claimant and the representative; and (c) whether, if an agreement between a claimant and a representative is champertous, that affects the proceedings to which the agreement relates (as opposed to the possible enforcement of that agreement).

The submissions on the appeal

7. The Secretary of State has not supported the appeal and the claimant's representative has responded to that submission, despite the Chief Commissioner's direction that observations be simultaneous. The Chief Commissioner has referred the case to me for decision.

The chairman's comments about the representative

8. My first thought on reading paragraph 2 of the chairman's statement was: what is the point of these comments? The only reason I could find for them was to explain why the tribunal had not adjourned for an oral hearing. That is confirmed by the chairman's comments when refusing leave to appeal. If that was her purpose, I have to say that she could have put it differently and more directly in a way that did not lead to the suspicion that her comments have created. Her comments are capable of being interpreted as a criticism of the method of funding, as an indication that that method was relevant to the assessment of the evidence, and as showing bias against the representative.

9. In view of the chairman's comments, I need to consider the funding of representation for claimants, the relevance of that funding when assessing the evidence, and whether the comments show that the tribunal was biased. Before doing so, I want to make say two things about the chairman's remarks.

10. The chairman's experience may be that the representative in this case always requests a paper hearing. I regularly see cases in which he is the representative and I have seen among them cases in which he has attended an oral hearing. I cannot, though, recall whether the oral hearing was at his request.

11. The chairman has used information obtained in another case, at a private hearing, and applied it to this case. I do not consider it necessary in this case to decide whether she was entitled to do that. I deal with funding of appeals in detail later. At this point, it is sufficient to say two things. First, if it is permissible to make use of information in this way, it has to be put to the claimant and the representative for comment. The information may not have been accurate in the earlier case and, even if it was, it may not apply in this case. That brings me to another point, which is this. The representative signed the claimant's claim form as someone who 'knows how your illnesses and disabilities affect you' and to certify that he knew that claimant and that 'they have an illness or disability.' I do not know if that is the representative's standard practice. If not, it may indicate that the representative was acting in this case as a favour rather than in the usual course of his work. If he was, there might be no fee. The chairman has not referred to this possibility.

The funding of representation

12. The parties have not responded to the Chief Commissioner's direction that they deal with the issue of champertous agreements. In view of the lack of argument, I am not able to give a definitive decision on this issue. However, my views are as follows.

13. The Chief Commissioner was referring to the rule of public policy that an agreement to support a legal action in return for a share of anything recovered is not enforceable. I am not

aware of any case in which that rule has been applied to proceedings similar to those that come before an appeal tribunal under the Social Security Act 1998 and do not consider that it applies. I also consider that applying the rule would undermine and be inconsistent with the claimant's right to representation.

Court and tribunal proceedings

14. There is a difference between proceedings in courts and in the appeal tribunal.

15. The court procedures for small claims have been devised to be operated by litigations in person. Otherwise, court procedures are usually complex and expensive. It is possible for a litigant in person to operate them and to fund the proceedings. But for the overwhelming majority of people who contemplate court proceedings outside the small claims procedure, action is only possible if it can be funded. That funding must cover the court fees and the cost of representation.

16. The procedures in the appeal tribunal are different. They have been devised for claimants to operate in person. That is not to say that representation is not useful; it is, for a variety of reasons. But it does mean that the choice for an appellant claimant is different from that for a potential court litigant. The former has the realistic choice of acting alone or of obtaining representation. The latter has little realistic chance of proceedings except with representation.

17. The significant of this distinction is this. A champertous agreement can encourage someone to embark on litigation that otherwise would not be undertaken. That is one of the factors underlying the rule of public policy. But the same agreement for the purpose of proceedings before an appeal tribunal does not have this effect. The claimant could easily proceed even if the funding is not available. This is a key difference from court proceedings, because an important factor in the public policy rule does not apply.

18. In view of this difference, I have not considered it relevant or necessary to deal with the recent court decisions on the changes in the methods of funding personal injury litigation.

The right to representation

19. Claimants have a right to be represented. Regulation 49(8) of the Social Security and Child Support (Decisions and Appeals) Regulations 1999 provides that

> 'A person who has the right to be heard at a hearing may be accompanied and may be represented by another person whether having professional qualifications or not ...'

Representatives cannot generally afford to act as charities. The only exception that I can think of is the free representation units. Otherwise, representatives are entitled to be paid for their services. Some representation is available at no cost to the claimant. It may be provided by a solicitor under legal services funding, by a law centre, or by a CAB or local authority's welfare rights unit. These services have limited resources available and their distribution around the country is uneven. If one of these sources is not available, a claimant can only obtain representation by paying a fee or by agreeing to some form of contingency arrangement. As most claimants have limited means, the latter may be the only realistic

option. If it were not permissible, the right to representation for those claimants who were not able to secure publicly funded representation would be rendered ineffective.

The relevance of funding when assessing the evidence

20. If the chairman's comments in any way related to the assessment of the evidence, they were wrong in law. All representatives want to do their best to achieve the best outcome for their clients. That is true whether they are paid from public funds or by the claimant and, if the latter, whether they receive a fee or a payment out of benefit awarded on the appeal. There is no reason for a tribunal to assume that there is any difference between representatives in this respect.

21. A tribunal has to make findings of fact on the evidence by a process of rational analysis. It has to consider the evidence as a whole. If it takes account of the method of funding relied on by the representative, it is taking account of an irrelevant consideration. This is easy to prove by taking an extreme example.

22. Imagine the most unethical and disreputable of representatives. Someone who is prepared to present, misrepresent or invent evidence to persuade the tribunal that the claimant is entitled to the benefit claimed. And who is prepared to adopt delaying tactics with the cynical purpose of increasing the amount of back-dated benefit from which the claimant must pay a percentage as a fee. Even a representative like this will have clients who are actually entitled to the benefit they are claiming without any need for the evidence to be invented, misrepresented or even glossed. But if the tribunal takes the method of funding into account, it will assume what it seeks to discover.

23. It is worth remembering that courts and tribunals that they are public bodies for the purposes of the Human Rights Act 1998. As such they are under a duty to give effect to a party's Convention rights. A claimant has a Convention right to a fair hearing. A tribunal violates that right if it does anything that undermines the effectiveness of the right to representation or takes account of a legitimate method of funding when assessing the evidence.

24. I said in paragraph 13 that *if* the tribunal took the method of funding into account, it went wrong in law. I have set out the tribunal's reasoning. The analysis of the evidence does not contain any express reference to the representative's funding and I can see no reason to infer that it must, or even may, have done so.

Bias

25. The chairman has said that there is no indication of bias. Her opinion on that issue is not admissible: *Facey v Midas Retail Security Ltd* [2001] ICR 287 at 303, citing *Locabail*. The issue for me is whether there is a real possibility that the tribunal or one of the panel members was biased: *Porter v Magill* [2002] 1 All ER 465 at paragraph 103 (Lord Hope). I do not consider that the chairman's comments are sufficient to show that she was biased against the claimant or the representative. They are certainly capable of being interpreted as showing annoyance and irritation with the representative's approach to appeals. But that falls short of bias. As I explain later, I consider that the tribunal's reasoning was defective, but that is not

the same as bias. The reasoning is capable of being explained without any need to assume bias.

Socialisation

26. I consider that the representative has taken the tribunal's comment about socialisation out of its context. My reading of that comment is this. Disability living allowance provides for attention in connection with bodily functions or supervision to avoid substantial danger. Merely helping a person to socialisation by itself is not sufficient to show entitlement. It is necessary to identify a bodily function or danger for which attention or supervision is reasonably required. If one of those can be identified, then the fact that its effect will be to assist socialisation is irrelevant. I read the tribunal as merely emphasising the need to find a bodily function or danger that is limiting socialisation.

How the tribunal went wrong in law

27. Although I reject the claimant's grounds of appeal, I do consider that the tribunal went wrong in law, because its findings and reasoning were inadequate.

28. As to findings, the representative put to the tribunal the claimant's evidence that he heard voices and becomes confused. He also drew attention to the side-effects of the claimant's medication, which might explain the confusion. The tribunal made no findings on those matters.

29. As to reasoning, the claimant's representative made a valid point about the evidence from the GP and the Consultant: the questions they were asked did not address some of the disabilities that the claimant reported. The chairman's reasons do not explain how the tribunal dealt with that argument. She has recorded that the tribunal relied on the evidence in the doctors' reports and how it did so, but those reasons do not deal with the issue raised by the representative. In other words, the chairman has shown what use the tribunal made of the medical evidence, but that does not deal with the point that it was potentially incomplete.

30. Also, I am not persuaded by the reasoning that 'The Tribunal does not agree that his GP will not know his patient or that the records are sparse in information.' Those are, of course, assumptions and they are almost certainly correct. But they are beside the point. The issue is not whether the GP knows the claimant or whether the GP's records are informative. The issue is what does the GP know and what do the records contain. It is certainly my experience of GPs that they are interested in and record symptoms, diagnosis and treatment, but are less concerned with the effects of the conditions on daily living. That is not a criticism of GPs; it is merely a reflection of their role. For what it is worth, my opinion is that the decision-maker's guidance reflects the likely reality of the information available to GPs. Nor do I agree with the tribunal that it was being asked to find that the GP's answer 'N/A' indicated that there were problems. What the tribunal was being asked to do was to interpret that answer as being 'N/A as far as I am aware and my records show.'

Disposal

31. I allow the appeal and direct a rehearing.

Signed on original
on 25 July 2005

Edward Jacobs
Commissioner