Bulleh 194

[Stott]

CDLA/1490/2006

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. This is an appeal by the Claimant, brought with my permission, against a decision of the Watford Appeal Tribunal made on 17 January 2006. For the reasons set out below that decision was in my judgment erroneous in law. I allow the appeal, set aside the Tribunal's decision and remit the matter for redetermination by an entirely differently constituted appeal tribunal.

2. The Claimant is a woman now aged 25. She was detained in hospital on 4 May 2005 under section 2 of the Mental Health Act following a mental health assessment, and was diagnosed to be suffering from an acute psychotic episode, manifesting itself in disorganised behaviour, delusional beliefs and thought disorder. She was discharged from hospital on 29 June 2005, and claimed disability living allowance on 10 August 2005. In a report dated 31 October 2005 her psychiatrist said that she was responding well to medication and was currently in a relatively stable mental state.

3. By a decision made on 4 November 2005 the claim was refused. The Claimant appealed.

4. On the Appeals Service Enquiry form, which she completed on 17 December 2005, she ticked the box indicating that she wanted a paper hearing, and did not give details of any representative. She enclosed with the completed form a letter, also dated 17 December, which may well have been typed by her father and which concluded by saying: "I apologise for not attending an oral appeal but I do not think I could cope with it."

5. The Tribunal, after a hearing on the papers, dismissed the appeal. Its detailed and careful Statement of Reasons included the following:

> "The Tribunal first considered whether they could reach a decision on the appeal in the absence of the appellant. They noted that .... the appellant has sent in a typescript letter indicating that she would not be attending an oral hearing as she did not think she could cope with it. Although she is supported by a Mental Health Team she did not indicate that anyone from the Mental Health Team supporting her or her parents or that any of those persons involved with her care would be attending. It is a matter for the appellant and the Tribunal cannot compel the attendance of an appellant or anyone on their behalf."

6. One of the grounds for this appeal is that the Claimant asked for a paper hearing because she was led by information supplied by the Appeals Service to believe that "my father would not be allowed to attend on my behalf to explain my evidence person to person as he attends all hospital and GP appointments with me."

7. The information in question was in an Appeals Service information document entitled "How to appeal – a step-by-step guide." On pages 16 to 17, under the heading "representatives", is the following:

"Even if you have an excellent representative, the tribunal at an Oral Hearing will almost certainly want to speak directly with you, person-to-person, asking you questions and listening to your answers. It is not acceptable for a representative to give your evidence on your behalf. This is because you will have first-hand knowledge and experience of the things the tribunal will want to hear, whereas your representative would only be able to give a second-hand version. For example, if your appeal involves problems you may have in walking, the tribunal will be very interested in hearing from you, in your own words, how you feel when you try to walk any distance. ....."

8. The passage which I have referred to in that document was I think directed primarily to evidence from a representative which is derived solely from what a claimant has told him, and not to evidence derived from the representative's own observation or experience. However, I can see how that passage could well have been read by the Claimant and/or her father as meaning that the Claimant's father would not be permitted to give evidence as to her condition and capabilities, because the Tribunal would only be prepared to hear evidence about that from the Claimant herself. That, however, is not the law (as indeed the passage which I have quoted from the Tribunal's Statement of Reasons recognised). A representative who has observed the Claimant's condition is entitled to give evidence of what he has seen and heard, although of course the Tribunal, in the exercise of its discretion to control the conduct of the hearing, may require the claimant to deal with the relevant matters in evidence first if the claimant is present, and may restrict the extent to which the representative gives evidence about matters which the claimant's own evidence has already covered: see CDLA/1138/03; CDLA/2462/2003.

9. In view of the fact that the Claimant and/or her father do appear to have been misled by the information in the Appeals Service guide, and would have asked for an oral hearing if they had appreciated that the Claimant's father would be permitted to give evidence, I think that there was an inadvertent breach of natural justice and that the Tribunal's decision must be set aside. The Secretary of State supports the appeal on that ground. Whether the relevant passage in the guide should be modified is a question which the Appeals Service may wish to consider.

(signed on the original) **Charles Turnbull**
Commissioner
6 September 2006

Bellch 155
CSIM

CDLA/487/2006

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. I allow the claimant's appeal. I set aside the decision of the Liverpool appeal tribunal dated 10 October 2005 and refer the case to a differently constituted appeal tribunal for determination.

REASONS

2. The claimant suffers from ischaemic heart disease, chronic urticaria and arthritis of the knees, toes and fingers. She claimed disability living allowance on 8 March 2005. Her claim was disallowed on 28 April 2005 and she appealed. On 10 October 2005, the tribunal dismissed her appeal, unanimously in respect of the care component but by a majority in respect of the mobility component. She now appeals against the tribunal's decision with my leave and the support of the Secretary of State.

3. The first ground of appeal is that the tribunal erred in finding –

> "that the appellant aged 65 suffered mild heart disease (single vessel coronary artery disease) but there was no need to insert stent to dilate the vessel".

It is said that there was no evidence to support the finding that there was no need to insert a stent, given that the claimant had told the tribunal that the possibility of doing so had been discussed at her last appointment, two months before the hearing. I am not persuaded that the tribunal erred in this respect. Firstly, it had to consider the position at the date of the Secretary of State's decision, which was before the possibility of inserting a stent had been discussed and, secondly, the tribunal may have inferred that it had been decided not to take the issue further because the claimant had not said that further action was going to be taken. It is true that she said that she had a further appointment but she did not say that it was for further discussion of the possibility of inserting a stent. In any event, the seriousness of her condition was relevant only insofar as the tribunal was able to infer from it how likely it was that she was as disabled as she said. The real question for the tribunal was to what extent the claimant's mobility and ability to care for herself was impaired.

4. The tribunal's answer to that question is the subject of the second and third grounds of appeal, which are that the majority of the tribunal did not adequately inquire into, or record adequate findings as to, the claimant's ability to walk and that the chairman failed to record adequate reasons for the majority rejecting the claimant's evidence and that of her general practitioner. So far as the second of those grounds is concerned, it seems to me that the majority accepted the evidence of both the claimant and her general practitioner save only for their estimates of the distance the claimant could walk. They had said she could walk only about 40 yards without severe discomfort and it was the acceptance of that evidence that led the third member of the tribunal to dissent. The majority's reasoning was –

> "that the nature of the heart condition was as already stated. Arthritis to knees was moderate and she had lasted 3-4 minutes on the treadmill. This was inconsistent with the mobility component claimed. Appellant also was able to attend her husband's grave at the nearby cemetery and go to the library taking a taxi."

In its context, it seems clear enough that the tribunal considered that the claimant could walk further than she and her general practitioner had estimated and I accept that it is unrealistic to expect a tribunal to record any very precise finding on such a matter.

5. However, the tribunal's reasoning is thin. Neither visiting her husband's grave, which the claimant is not recorded as having said she did entirely on foot, nor going to the library by taxi necessarily involved walking more than 40 yards. Of considerably more significance, no doubt, was the claimant's evidence that she had managed 3 to 4 minutes on the treadmill when undergoing tests. However, when she was first asked about that, she is recorded as having said: "Don't know how long I lasted" and it is noteworthy that, in her claim form, 3 to 4 minutes was the amount of time she had estimated it would take her to walk 30 to 40 yards. That would be very slow, which raises the question of how accurate her estimates of distance and time were.

6. What is of even greater importance is that, by regulation 12(1)(a)(ii) of the Social Security (Disability Living Allowance) Regulations 1991 (SI 1991/2890), the question whether a person is virtually unable to walk has to be determined having regard not just to the distance over which, the speed at which and the length of time for which a person can make progress on foot but also the manner in which he or she can do so. The majority said nothing about the manner in which the claimant could walk, which might be highly material if the distance over which she could walk and the speed at which she could walk were very limited but not quite limited enough themselves to mean that she was virtually unable to walk. In this case, the claimant had referred to stumbling and there was evidence from her general practitioner that she was "unable to hold a walking stick because of pressure urticaria".

7. The cumulative effect of all these matters satisfies me that the majority's reasoning is inadequate and accordingly the tribunal's decision is erroneous in point of law.

8. I also accept the submission of both parties that the majority erred in law in failing to consider the criteria for entitlement to the lower rate of the mobility component under section 73(1)(d) of the Social Security Contributions and Benefits Act 1992, given the evidence of stumbling and of panic attacks bringing on heart palpitations.

9. I do not have the advantage of any submission by the Secretary of State as to the significance of the general practitioner's letter of 16 August 2005 or the claimant's oral evidence to the tribunal. In those circumstances, this case must be considered by another tribunal.

10. It would be helpful if, in all cases where a claimant's appeal is supported and there is more evidence before the Commissioner than was available to the Secretary of State when the last submission was made to the tribunal, the Secretary of State were to indicate, with a brief reason, whether he still wished to stand by his original decision in every respect. There will often be further material evidence simply because there is a record of oral evidence given to the tribunal. New medical evidence is also common. Most submissions made by the Secretary of State to Commissioners give no indication that he has addressed his mind to the question whether, if that evidence had been available in the first place, a different award would have been made. Where there has been an oral hearing before a tribunal and the tribunal's decision has been set aside by a Commissioner without such a hearing, the

Commissioner cannot usually substitute a decision unless there is a concession by the Secretary of State that an award should be made. However, where there is such a concession, it is often possible to accept it and avoid the necessity of referring a case to another tribunal. Even where there is no such concession, the fact that the Secretary of State does not make the concession and explains why, gives the claimant the opportunity of making written submissions in reply and that will sometimes enable a Commissioner fairly to adjudicate on the issue on the papers. The effort will not be wasted even in cases where the Commissioner does refer the case to another tribunal, because the submission will be relevant to the proceedings before the tribunal.

(signed on the original) **MARK ROWLAND**
Commissioner
12 July 2006