CDLA/1552/1998

1 I allow the claimant's appeal against the decision of the London disability appeal tribunal, brought by leave of the Commissioner. The decision of the tribunal was to award the lowest rate of the care component of disability living allowance from 19 April 1997 to 18 April 1998. For the reasons given below, the decision was erroneous in law. I therefore set it aside. I substitute for it my own decision, which is:

The claimant is entitled to the care component of disability living allowance at the highest rate from 19 April 1997 to 11 December 1997 (inclusive) and at the lowest rate from 12 December 1997 to 18 April 1998 (inclusive). She is not entitled to either rate of the mobility component for any part of that period.

As this is a decision on the facts, either party is at liberty to refer any point of uncertainty or dispute arising in respect of the implementation of this decision back to me (or to another Commissioner if I am not available).

2 I held an oral hearing of the appeal on 18 October 1999. The claimant attended and was represented by Mr Blake for Islington Legal Advice Centre. The adjudication officer was represented by Mr Heath of the Office of the Solicitor to the Department of Social Security. I am most grateful to both Mr Blake and Mr Heath for their help in this case.

Background to the appeal

3 The claimant first claimed disability living allowance in October 1994. The main, but not only, reason was the limitation caused by recurrent dislocations of both her shoulders, from which she suffered since a teenager. She claimed limits to both mobility and personal care. After refusals by the adjudication officers, the claimant submitted further medical evidence and appealed. The tribunal ("the first tribunal") on 12 September 1995 awarded the highest rate of the care component from 19 October 1994 to 18 April 1997 but neither rate of the mobility component. The tribunal's decision was brief. There is a chairman's note of evidence. There is no indication in the decision, or the findings made or reasons given, why the end date was set when it was. The only relevant comment, in the record of proceedings, is "the shoulder operation will be in 96 at the latest".

4 The claimant made a renewal claim in November 1996. A note from the general practitioner on that claim stated "surgery planned for June 1997". A reasoned decision refusing full renewal, but awarding the lowest rate of the care component for one year from 19 April 1997, was given, and confirmed on review. The claimant appealed against this, supporting her appeal by reference to the previous tribunal decision. She explained that her continuing need was because she had had to wait longer than expected for operations to each of the shoulders, with time for recuperation. She also stated that the first tribunal had awarded the highest rate of the care component "for the duration of my two operations and recuperation". She later supplied information about the second shoulder operation on 8 May 1997. The adjudication officer commented to the appeal tribunal, on receiving this information, that it "confirms that she should satisfy the

conditions of entitlement to an increased rate of benefit as originally requested in the application for appeal."

5 The claimant chose not to attend the tribunal hearing in September 1997 ("the second tribunal"), stating in her letter:

> "Having to go back to the Independent Tribunal to once again sort his matter out seems to me to be a waste of everyone's time as well as causing further and unneccessary worry and stress for me...".

The second tribunal confirmed the award of the lowest rate of care component for one year. The chairman produced a full statement of material facts and reasons for the tribunal's decision. This made it clear that the tribunal was aware of the decision of the previous tribunal, but the statement concludes:

> "Whatever the previous tribunal may have said does not bind us, and we can only make our decision on the evidence before us."

6 The claimant made an application for leave to appeal against that decision in strong terms. She particularly took exception to the final phrase of the tribunal statement quoted in the previous paragraph. At the oral hearing before me, the claimant's representative expressly withdrew the aspects of the grounds of appeal that appeared to make accusations against the tribunal. Having heard the representative, I consider them withdrawn as unfounded.

The consequence of electing for a paper hearing

7 The claimant's representative did maintain, in measured tones, the claim that the proceedings at the second tribunal were in breach of natural justice. This was, he argued, because it failed to follow the decision of the first tribunal both in the absence of the claimant and without taking steps to consider the evidence not otherwise available to it. That argument raises an important point of principle about hearings conducted by tribunals as "paper hearings" where claimants have, as in this case, expressly waived their right to an oral hearing. The issue is whether the decision of the claimant not to ask for an oral hearing is absolute, in the sense that the tribunal must proceed in the claimant's absence, or whether there are exceptions. In other words, are there cases where, notwithstanding that a claimant has given a general waiver of the right to attend, the tribunal should not proceed without directing an oral hearing or adjourning to give the claimant an explicit invitation to attend or to provide a further written submission? It also raises an issue about the power of a tribunal conducting a paper hearing to adjourn.

8 When the second tribunal hearing was listed, tribunal procedure about notice of hearings had been changed from the procedure used by the first tribunal. Under the revised procedure, claimants were asked whether they wanted an oral hearing: Social Security (Adjudication) Regulations 1995 regulation 22 (1) (and see now Social Security and Child Support (Decisions and Appeals) Regulations 1999, regulation 39(1)). A claimant who did not ask for an oral hearing was told in a standard letter that the appeal will be decided on the paper evidence only. This is usually called a "paper hearing". That happened in

this case. The record of proceedings of the tribunal states only: "Paper hearing". The claimant heard nothing further from the tribunal until the decision was issued.

Requiring an oral hearing

9 Nonetheless, it is clear from the regulations that a tribunal conducting a paper hearing because the claimant has not requested an oral hearing is not bound to decide the appeal only on the papers. Regulation 22 of the Social Security (Adjudication) Regulations 1995 (and regulation 39 of the Social Security and Child Support (Decisions and Appeals) Regulations 1999) expressly provides (in regulation 22(1C), and to the same effect in regulation 39(5)):

> "The chairman of the tribunal may of his own motion require an oral hearing to be held if he is satisfied that such a hearing is necessary to enable the tribunal to reach a decision."

This is consistent with the general procedural provision (in regulation 2 of the Social Security (Adjudication) Regulations 1995 and regulation 38 of the Social Security and Child Support (Decisions and Appeals) Regulations 1999) that the procedure of a hearing shall be such as the chairman (or legal panel member) shall determine.

10 While the regulations do not state this expressly, the context of regulation 22 (1C) makes it clear that this operates by way of an overriding provision to the general procedure laid down in regulation 22(1). It is also clear that the waiver by a claimant of the right to an oral hearing is not the only determinant that the appeal will have a paper hearing. There is still a duty on the chairman to decide if the claimant should be present because it is "necessary to enable the tribunal to reach a decision". That, in my view, is a recognition that fairness may, in some cases, require that there be an oral hearing even when the claimant does not ask for one.

11 No guidance is given in the regulations about when the attendance of a claimant is necessary. Nor would I expect such guidance, as a variety of circumstances may give rise to considerations of fairness. And I need not attempt, for the purposes of this case, to define what "necessary" might mean, save that I take it to mean "reasonably necessary". I would take that as including any case where a failure to hold an oral hearing makes the appeal proceedings as a whole unfair. In other words, if the conduct of the hearing on paper only, and without the claimant being given another chance to be heard in person, is such that it is unfair, then the chairman or legal panel member must direct an oral hearing. The consequence of a failure to direct an oral hearing in such a case will be that the decision of the tribunal should be set aside as erroneous in law for breaking the principles of natural justice. It follows that a chairman (or legal panel member) should have in mind the power to require an oral hearing where issues of fairness arise.

12 It is consistent with that view that the power of a tribunal (or legal panel member) to set aside a tribunal decision includes the power to set aside a decision of a tribunal taken in the absence of a claimant who did not give notice

that he wished an oral hearing to be held if "satisfied that the interests of justice manifestly so require." (Regulation 10(1A) of the Social Security (Adjudication) Regulations 1995; regulation 57(2) of the Social Security and Child Support (Decisions and Appeals) Regulations 1999). The reference to "manifestly so requires" calls to mind the salutary words of Lord Hewart CJ that justice must not only be done but must manifestly and undoubtedly be seen to be done. But while the meaning of "manifestly" is clear in Lord Hewart's phrase, here it appears tautological.

Adjourning paper hearings

13 There are also powers to postpone or adjourn hearings. Regulation 5 of the Social Security (Adjudication) Regulations 1995 provides for postponements and adjournments. (Again, there is a similar provision in regulation 51 of the Social Security and Child Support (Decisions and Appeals) Regulations 1999). Regulation 5(2) and (3) provide (so far as relevant):

> "(2) A chairman ... may of his own motion at any time before the beginning of the hearing postpone the hearing.
>
> (3) An oral hearing ... may be adjourned by the adjudicating authority ... at any time ... of its ... own motion."

The language of paragraph (3) is the same as regulation 5(2) in the Social Security (Adjudication) Regulations 1986, and predates the introduction of paper hearings. Further, it was not amended when paper hearings were introduced. But the wording would seem not to apply to a paper hearing (although that may be arguable, given the history of the wording, and that this is not primary legislation).
There is no express provision dealing with adjournment of paper hearings.

14 The conclusion might be argued that a paper hearing cannot be adjourned. That cannot be right. There must be a power to adjourn a paper hearing. It is sometimes necessary for supervening reasons such as illness or lack of time (because once the case is before the tribunal it cannot be postponed, only adjourned). It is also necessary because otherwise effect cannot be given to other provisions in the Social Security (Adjudication) Regulations 1995. For example, the tribunal chairman conducting either an oral hearing or a paper hearing may:

> "at any stage of the proceedings ... give such directions as he may consider necessary or desirable for the just, effective and efficient conduct of the proceedings and may direct any party to provide such further particulars or produce such documents as may reasonably be required..."
> (regulation 2(1)(aa); see also regulation 38(2) of the Social Security and Child Support (Decisions and Appeals) Regulations 1999).

Further, where a chairman decides to require an oral hearing under regulation 22(1C) an adjournment will be necessary to allow the parties to attend. It is inherent in, because necessary to, the exercise of such powers that there is a power to postpone or adjourn a paper hearing so that the direction may be

carried out. Further, it is clear from the wording that those powers exist at any time before the tribunal has reached its decision, and therefore must exist during the hearing.

15 Under regulation 5 the power to adjourn an oral hearing is the power of the tribunal not the chairman (see also regulation 51 of the Social Security and Child Support (Decisions and Appeals) Regulations 1999). A distinction is also drawn in the regulations about oral hearings between a power of a chairman (or, in the new regulations, a clerk) to *postpone* and a power of a tribunal to *adjourn*.

16 Who has the power to adjourn a paper hearing, the tribunal or the chairman and clerk? This is important because a decision of a tribunal not to adjourn is a decision open to appeal. A decision of a chairman or clerk not to postpone (or adjourn) is not a decision of the tribunal and is not open to appeal. However, the decision of a chairman or clerk not to postpone a hearing before it occurs is open for renewal before, and reconsideration by, the tribunal at the non-postponed hearing. The clear pattern of the legislation is that a decision about an adjournment at a hearing is an appealable decision. A decision about a postponement before a hearing is not appealable but can be challenged at the hearing.

17 In my view, the power to adjourn a paper hearing must be a power of the tribunal in the same way as for an oral hearing. I take this view for several reasons. The decision to adjourn or not to adjourn is not merely a procedural decision. While a postponement will in most cases merely delay a decision, and a refusal to postpone is open to reconsideration, a decision about an adjournment will usually have substantive, and often final, effect on an appeal. It is therefore a decision which, if taken or refused in error of law, should be open to appeal. That was the system laid down by Parliament and Ministers before the introduction of paper hearings. There is nothing in the subsequent changes of legislation that suggests any intention to remove the power of adjournment from the tribunal or to transfer it to the chairman, and there are no express words requiring that result. Further, I approach any such changes with the view that a right of appeal can only be removed if there is clear legislation authorising that removal. There is none here. The reality is that the wording in the Social Security (Adjudication) Regulations 1995 dealt with all social security appeals when it was first made. It now does not do so, and no other wording has taken its place.

18 It follows from the above that the power to adjourn a paper hearing is not a matter that can be regarded as an exercise of the general power of a chairman to control procedure. Instead, it is a power to be exercised by the adjudicating authority (in this case, the tribunal) in effect in the same terms as the power for an oral hearing in regulation 5(3) of the Social Security (Adjudication) Regulations 1995. Insofar as the equivalent provisions of the Social Security and Child Support (Decisions and Appeals) Regulations 1999 are relevant to this case, I reach the same conclusion about the power to adjourn a paper hearing under that procedure. Those regulations have been reorganised as compared with the 1995 regulations, but the problem discussed here is, in my view, also present in

those regulations and warrants the same conclusion. I also note that this appears to be the basis on which the standard form often used by tribunals for paper hearings (but not used in this case) includes consideration of whether the tribunal should adjourn.

19 It also follows that a tribunal conducting a paper hearing should have in mind the power to adjourn. That can be used, as part of a paper procedure, to issue a direction for further particulars or documents. That power could have been used in this case to obtain a further submission from the claimant to deal with the evidence that the tribunal said that it lacked, but which the first tribunal appeared to have had. It may be that the power is also wide enough to direct the claimant to reconsider the election for a paper hearing, or to adjourn to invite attendance without requiring it. But I need not consider this further as it is not necessary for my decision.

Preventing paper hearings being unfair

20 A tribunal or chairman therefore has three ways of preventing the decision of a tribunal taken after a paper hearing from being unfair because of the absence of the claimant : to adjourn so that the chairman can require an oral hearing; to adjourn to direct further information or documents be produced; to set aside the decision in the interests of justice because the claimant was absent. It is of the essence of the exercise of the first two of those powers that they be done at the hearing, without application from the parties, by tribunals of their own volition. A tribunal conducting a paper hearing must have these powers in mind and must consider their use in any appropriate case. This is because the duty to give all the parties to a disputed claim properly brought before a disability appeal tribunal a fair hearing applies to every hearing by the tribunal, whether or not the claimant has asked for an oral hearing.

The circumstances in this case

21 This is an unusual case, and I do not draw any general conclusions from it. The claimant attended, with her husband, an oral hearing of a disability appeal tribunal. She won her appeal at that hearing and was given a fixed term award of benefit. She was led to believe by what she understood from that tribunal that it had reached its decision about the fixed term on certain grounds. It is also fair to say that she thought that those grounds were entirely appropriate, and the adjudication officer did not appeal. Unfortunately, the decision and record of the tribunal decision did not deal with this point. While the recollection of the claimant is not inconsistent with the decision of the tribunal, the official record of the tribunal decision does not show if the claimant was right or wrong in her recollections. It must also be said that a full tribunal decision should have shown the reason for the fixed term of award chosen. The first tribunal decision may be criticised for not dealing expressly with this as it was part of the reasoning process of the tribunal in reaching its conclusion and also part of the explanation given to the claimant for it.

22 The claimant expressly stated that she was not attending the second tribunal hearing so as not to waste everyone's time. In her view, her attendance the first time was enough. It was a deliberate decision for which she gave reasons. She did so because she thought the second tribunal would reach a decision consistent with the first tribunal decision. In my view, in the circumstances of this case that was a legitimate expectation on her part. She had been completely open with both tribunals, and there is no issue of credibility about her evidence. Further, the essential facts considered by the first tribunal had not changed. It was not her fault if the first tribunal decision proved to be deficient. The claimant produced what she thought was the necessary additional medical and other evidence to show that there had been no change, consistent with her view of the decision by the first tribunal. Also consistent with that approach, she had dropped her claim for either rate of the mobility component on her appeal, and was requesting only an extension of the fixed term award made by the first tribunal because nothing had changed save for the period to which that award should, in her view, be extended. Nor was she claiming an open-ended extension. Further, she had seen in writing the statement that the adjudication officer had thought she had made her case.

23 This is an unusual combination of issues. Put at its simplest, it is a case of who should take responsibility for the deficiencies noted in the first tribunal's decision by the second tribunal. Should it be the claimant, as the second tribunal effectively decided, or should the second tribunal have considered taking its own initiative to make good the defect, as the claimant's representative argues?

24 The second tribunal decided as it did because: " ... we can only make our decision on the evidence before us." In these particular circumstances, I agree with the claimant that that is wrong in law. The tribunal had available to it, or to its chairman, two ways in which it could have made its decision with additional evidence. It was *not* required to make its decision only on the evidence before it. In the particular case, I am persuaded by Mr Blake's argument that, despite the strong support given to the tribunal decision by Mr Heath, the tribunal should have considered adjourning for further evidence in the interest of fairness, even if an oral hearing was not thought to be necessary. It failed to do so, and I therefore set aside its decision.

My own decision

25 Having set aside the tribunal's decision, I consider it expedient to replace it with my own. Unlike the second tribunal, I had the advantage of hearing the claimant and her representative. I may also consider any further evidence relating to the period under dispute. It is a fixed period because the claimant conceded to me that she had no basis to claim any level of disability living allowance once the fixed term award under appeal had ended, and she had made no further claim. Further, I have the guidance of the decision by the first tribunal and, subject to the points made above, the second tribunal. I have the assistance of the comments made by the adjudication officer to the second tribunal and by Mr Heath, and

note the absence of any criticism of the award by the second tribunal of the lowest rate of the care component for the period in question.

26 The only substantive issue in dispute is whether the highest rate of the care component should continue for all or part of the period under appeal, rather than the lowest rate of the care component. Again, the claimant herself conceded by a letter received by the tribunal service on 12 December 1997 that "from the date of this letter onward" the lowest rate of the care component would be correct. Having considered all the above, I accept the claimant's own evidence that she is entitled to the lowest rate of the care component from 12 December 1997 to 17 April 1998 but not beyond that later date. I accept the decision of the first tribunal, supported by the claimant's own evidence to me and the medical evidence before me, that the claimant was entitled to the highest rate of the care component to 11 December 1997 on the basis determined by the first tribunal. She is not entitled to either rate of the mobility component. My formal decision is in paragraph 1.

David Williams
Commissioner
25 November 1999

(Violaris)

DW/f

CONSIDERATION NOTE

Procedure - paper hearings - powers of tribunals to adjourn - Social Security (Adjudication) Regulations 1995 regulations 2, 5, 22.

This decision is circulated because it deals with a small but important "hole" in the Social Security (Adjudication) Regulations 1995 which also appears in the Social Security and Child Support (Decisions and Appeals) Regulations 1999.

Regulation 5 of the Social Security (Adjudication) Regulations 1995 gives tribunals power to adjourn oral hearings only (similarly the 1999 regulations). There is no express provision in the Social Security (Adjudication) Regulations 1995 dealing with adjournments of paper hearings. I hold that there must be a power to adjourn, and that the power belongs to the tribunal not the chairman. Failure to consider adjourning can therefore be subject to appeal (paragraphs 13 - 19).

More generally, I note the means by which a tribunal can stop a paper hearing being unfair because of the absence of the claimant (paragraph 20). On the unusual facts of the case I hold that the second tribunal erred in law in failing to consider adjourning its paper hearing (paragraphs 21 - 24).

DW

25.11.99