Bullen 191

DSHeat J

CDLA 1670 2004

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1 I dismiss the appeal. For the reasons below, the decision of the tribunal is not wrong in law.

2 The claimant and appellant is appealing with my permission against the decision of the Derby appeal tribunal on 22 March 2004 under reference U 42 034 2003 02431.

REASONS FOR THIS DECISION

3 The tribunal refused disability living allowance after an oral hearing at which both the claimant and the Department were represented, and which she attended with her husband. The claimant was seeking only the lowest rate of the care component. The tribunal properly considered whether any other aspect of disability living allowance should have been considered, but saw no reason to do so. There is a full record of proceedings and a full statement of reasons. The claimant put in lengthy grounds of appeal. These extensively criticised the decisions of the tribunal and Secretary of State. They included comments about the questions asked in the DLA form DLA1A.

4 The question asked in the claim form, and the explanation given, are:

> **Would you have problems because of your illness or disability if you prepared a cooked main meal for yourself?**
> We mean cooking proper meals on a traditional cooker, not using a microwave or convenience foods. Some example might be that you cannot:
> - plan the meal
> - peel or chop vegetables
> - use taps
> - use a cooker
> - use cooking or kitchen tools
> - cope with hot pans
> - tell when food is cooked properly.

Claimants are then invited to:

> Describe in your own words the problems you would have and the help you would need if you prepared a cooked main meal for yourself.

This claimant did so at length. I invited a submission from the Secretary of State because the claimant, among her grounds of appeal, challenged the standard wording of the form. The secretary of state's representative did not support any aspect of the appeal.

5 What is called the "cooking test" is laid down in section 72(1)(a)(ii) of the Social Security Contributions and Benefits Act 1992. As applied to this case it is:

> ... a person shall be entitled to the care component of disability living allowance for any period throughout which she is so severely disabled physically or mentally that she cannot prepare a cooked main meal for herself if she has the ingredients.

6 That test has been interpreted by the court of highest authority, the House of Lords, in *Moyna v Secretary of State for Work and Pensions, [2003] UKHL 44, R(DLA) 7/03*. The relevant passage by Lord Hoffmann is:

> 17. My Lords, there are two points to be made about the "cooking test" in section 72(1)(a)(ii). The first is that its purpose is not to ascertain whether the applicant can survive, or enjoy a reasonable diet, without assistance. It is a notional test, a thought-experiment, to calibrate the severity of the disability. It does not matter whether the applicant actually needs to cook. As the form DLA 1 said, "try to imagine how much help you would need if you tried to do this." No doubt some people (disabled or otherwise) do need to cook or prefer to do so, although home cooking seems to be fighting a losing battle against convenience foods and ready-cooked meals. Not for nothing is the notional meal contemplated by the cooking test described in the authorities as "traditional". It must be remembered that disability living allowance is a non-contributory, non-means tested benefit. A person who cannot cook for himself is entitled to the allowance, now £14.90 a week, whether he solves the eating problem by obtaining help, having a wife, buying television dinners or dining at the Savoy. On the other hand, even if a person needs to cook and has the motor skills to do so, he may still need assistance: to obtain the ingredients which the test assumes him to have, or because he is culinarily incompetent. So in my view the Court of Appeal was wrong to lay such emphasis upon the fact that unless the applicant could cook more or less every day, she would not enjoy a reasonable quality of life.
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> 18. That leads on to the second point, which is that the test says nothing about how often the person should be able to cook. It would have been easy for Parliament to say that a person should be able to cook daily or six times a week or whatever. Instead, the statute approaches the question of frequency in a different way. Section 72(2) contemplates that one should be able to say of someone *throughout* a nine month period that he is a person whose disability is such that he cannot cook a main meal. What does this mean? One possible construction is that if there was a single occasion during the period when a remission in his disability would have allowed him to cook a meal, it cannot be said that throughout the period he was unable to do so. But the Secretary of State does not contend for this construction and I do not think that it would be right. That is not because one occasion is *de minimis* but because the test does not in my opinion function at that day to day level. It involves looking at the whole period and saying whether, in a more general sense, the person can fairly be described as a person who is unable to cook a meal. It is an exercise in judgment rather than an arithmetical calculation of frequency.
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> 19. I therefore agree with the commissioner that the question involves taking "a broad view of the matter and reaching a judgment".

7 The reference by Lord Hoffmann to "the cooking test described in the authorities as "traditional" " is a reference to R(DLA) 2/95 where Commissioner Heggs defined the test as that of "a labour intensive reasonable main daily meal freshly cooked on a traditional cooker ... a ... meal for one person, not a celebration meal or a snack ...the test includes all activities ancillary to cooking such as reaching for a saucepan, putting water in it and lifting it on and off the cooker." I take the House of Lords to be endorsing that test, but doing so in its own words and therefore to some extent replacing it. As a matter of both definition and interpretation the test can in my view be taken little further. For that reason, I do not consider any other earlier Commissioner's decision to be of assistance in this case. And I see no problem with the wording of the form DLA1. Essentially, it leaves it to the claimant to explain her or his own problems, and for decision makers to decide if the test is met.

8 The task is to apply the test to the problems the claimant has. That is a question of fact, not law. The starting point, as Lord Hoffmann comments, is what the claimant says in the claim form. To that must be added all other evidence. The tribunal's job, if there is a dispute, is to test for itself the claimant's abilities against the hypothetical test. It can do that by direct application - finding what difficulties the claimant actually has in cooking in the way he or she does so, if that happens. And it can do that by indirect application - finding what limits the claimant has on gripping, lifting, bending, planning or otherwise by reference to other activities the claimant does undertake such as eating, washing, driving, shopping, cleaning, being aware of danger, or any other physical or mental activity using the same bodily functions as are normally used in cooking. Having looked at all the available evidence, it must then, as the House of Lords expressly confirmed, take a broad judgmental view about whether the claimant's problems are such that the claimant is or is not able to meet the test for the relevant period, with input from all three members of the tribunal.

9 This tribunal started by noting and making findings about the claimant's medical conditions. It then considered the written and oral evidence of her ability to prepare a cooked main meal, assessing her ability both directly and indirectly. The consideration of her ability to get dressed, drive, use a car, go shopping and so forth was put alongside that of her actual cooking ability, including the oven she used, the need to bend and the risk of dropping things. The record shows that the tribunal put specific issues of dispute to the claimant for her comments during the hearing. Where there was inconsistent evidence, the tribunal dealt with the issue, explaining its approach. The tribunal drew its conclusion based on an overall view of all the evidence. I reject the lengthy attempt by the claimant to pull the statement of the tribunal to pieces and criticise individual parts. It should be judged as a whole. Far from being a decision to be criticised so extensively, it is in my view an extremely thorough decision on the facts. It does exactly what a tribunal should have done. I reject all the claimant's grounds of appeal. She clearly disagrees on the facts, but despite her strenuous efforts to do so she shows no error of law in the decision.

David Williams

Commissioner

24 August 2004

[Signed on the original on the date shown]