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THE SOCIAL SECURITY COMMISSIONERS

Commissioner's Case No: CDLA/2089/2004

APPEAL AGAINST A DECISION OF AN APPEAL TRIBUNAL

DECISION OF MR COMMISSIONER JACOBS

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 fox Court appeal tribunal, held on 23 March 2004 under reference U/42/242/2004/00723, 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 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.

In particular, the appeal tribunal must investigate and determine how regulation 2(2)(d) of the Social Security (Disability Living Allowance) Regulations 1991 applies to the claimant's circumstances.

What this case is about

2. The claimant was awarded a disability living allowance consisting of the mobility component at the higher rate and the care component at the highest rate. The claimant has gone to Germany, where she says she will receive better treatment for her medical condition. Is she entitled to receive payment of her disability living allowance while absent from Great Britain?

3. The Secretary of State decided that she was not so entitled and the appeal tribunal confirmed that decision. I granted leave on the ground that the tribunal had misdirected itself on the interpretation of regulation 2(2)(d) of the Social Security (Disability Living Allowance) Regulations 1991. The Secretary of State has supported the appeal on that ground and I have directed a rehearing. This will allow the relevant issues of fact to be investigated by a fact-finding tribunal.

The legislation

4. Section 71(6) of the Social Security Contributions and Benefits Act 1992 provides that

'A person shall not be entitled to a disability living allowance unless he satisfies prescribed conditions as to residence and presence in Great Britain.'

The relevant conditions are prescribed in regulation 2 of the Social Security (Disability Living Allowance) Regulations 1991.

5. The basic rule is in paragraph (1)(a)(ii):

'(1) Subject to the following provisions of this regulation, the prescribed conditions for the purposes of section 71(6) of the Act as to residence and presence in Great Britain in relation to any person on any day shall be that-

(a) on that day-

...

(ii) he is present in Great Britain’.

6. Two other paragraphs are potentially relevant. They are paragraph 2(2)(d) and (e):

‘(2) For the purposes of paragraph (1)(a)(ii) and (iii), notwithstanding that on any day a person is absent from Great Britain, he shall be treated as though he were present in Great Britain if his absence is by reason only of the fact that on that day-

...

(d) his absence from Great Britain is, and when it began was, for a temporary purpose and has not lasted for a continuous period exceeding 26 weeks; or

(e) his absence from Great Britain is temporary and for the specific purpose of being treated for his incapacity, or a disabling condition, which commenced before he left Great Britain, and the Secretary of State has certified that it is consistent with the proper administration of the Act that, subject to the satisfaction of the foregoing condition in this sub-paragraph, he should be treated as though he were present in Great Britain.’

How the legislation applied to the claimant’s circumstances

7. The effect of paragraph (1)(a)(ii) is that the claimant is not entitled to receive her disability living allowance unless she comes within one of the ‘following provisions of this regulation’.

8. Paragraph (2)(e) does not apply to the claimant, because the Secretary of State has not certified as there provided. The tribunal decided that this provision did not apply and that decision was correct.

9. The tribunal also decided that paragraph (2)(d) could not apply. That decision was wrong, because it misinterpreted the provision. According to the tribunal, an absence that has exceeded 26 weeks is not temporary. That may be correct as a matter of fact in the circumstances of a particular case. But it is not correct as a matter of law, which is how the tribunal disposed of the issue.

10. Regulation 2 provides for entitlement to payment to be decided on a day by day basis. It contemplates that the decision-maker will be considering the issue as circumstances occur and, perhaps, as they change. The emphasis will be on the present. But, in considering the present position, the decision-maker may also have to take account of how things may develop in the future. This is necessary if the decision-maker has to decide whether the claimant is absent for a temporary purpose.

11. Paragraph (2)(d) creates an exception based on two facts: (a) the absence must be for a temporary purpose; and (b) the absence must not have lasted for a continuous period of more

than 26 weeks. They are separate factors. The wording of the provision does not use the 26 week period to define 'temporary'. It qualifies 'absence', not 'temporary purpose'. What the 26 week period does is to limit the maximum extent to which a claimant may remain entitled to payment of a disability living allowance.

12. In applying paragraph (2)(d), the tribunal should have asked these questions. Was the claimant absent from Great Britain? If so, what was the purpose of her absence? And was it a temporary purpose? If it was a temporary purpose, the tribunal should have decided, on the evidence in this case, that the claimant remained entitled to payment of her disability living allowance for 26 weeks. This approach is consistent with the day by day application of regulation 2.

Misdirection

13. The claimant has complained that she was wrongly advised by the Department on her entitlement while in Germany. The appeal tribunal had no power to deal with an issue of misdirection. It only had jurisdiction to decide if the law had been correctly applied to the facts of the case. The tribunal at the rehearing will not have jurisdiction to deal with this issue.

Disposal

14. I allow the appeal and direct a rehearing.

**Signed on original
on 7 September 2004**

**Edward Jacobs
Commissioner**