

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 Colwyn Bay appeal tribunal, held on 23 March 2004 under reference U/03/190/2003/00716, 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.

The appeal tribunal must investigate and determine the claimant's entitlement to a disability living allowance on and from 23 May 2003, the date when he made his claim for an allowance.

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 (16 July 2003): 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*.

What I have to decide

2. The claimant's appeal was heard at the Colwyn Bay venue. His representative sent a fax to the venue applying a statement of the reasons for the tribunal's decision. The fax was sent within one month of the hearing. However, a clerk did not visit the venue until after the end of the month. In those circumstances, was the request for the statement in time?

History

3. The claimant made a claim for a disability living allowance on 23 May 2003. The Secretary of State obtained a factual report from the claimant's GP and then refused the claim. The claimant appealed against that decision with the assistance of a welfare rights officer from his local council. His appeal was heard at Colwyn Bay on 23 March 2004. The appeal was allowed in part and the claimant was awarded a disability living allowance consisting of the care component at the lowest rate for 2 years. The chairman signed a decision notice to that effect on the day and it was given to the claimant. The claimant's representative sent a fax applying for a statement of the reasons for the tribunal's decision. That fax was sent to the Colwyn Bay venue, where it was recorded as received on 23 April 2004 at 13.11. The request was put to a district chairman who decided that it was late and refused to extend time. A tribunal clerk told the representative that the request was late because there were no sittings at the venue between 20 and 29 April.

4. The claimant applied for leave to appeal, inevitably without a statement. That made the application irregular, but I waived the irregularity under regulation 27 of the Social Security

Commissioners (Procedure) Regulations 1999 and gave the claimant leave to appeal. The Secretary of State has supported the appeal.

The significance of reasons

5. A tribunal's decision is wrong in law if the chairman does not provide a statement of the reasons for decision in accordance with the procedural regulations.

Obtaining reasons for decision

6. Tribunals are judicial bodies. As such, they must always have reasons for their decisions. If they do not, their decisions are arbitrary and not judicial. However, the tribunal does not have to provide a full statement of its reasons in every case. The chairman has to provide a decision notice recording the decision in summary: see regulation 53(1) to (3) of the Social Security and Child Support (Decisions and Appeals) Regulations 1999. The practice of chairmen varies: some provide decision notices that are more informative than others. However, the notice will seldom give a full account of the tribunal's reasoning.

7. A party to the proceedings who wants a fuller account of the tribunal's reasons may apply for this under regulation 53(4). This provides:

'A party to the proceedings may apply in writing to the clerk to the appeal tribunal for a statement of the reasons for the tribunal's decision within one month of the sending or giving of the decision notice to every party to the proceedings or within such longer period as may be allowed in accordance with regulation 54 and following that application the chairman, or in the case of a tribunal with only one member, that member shall record a statement of the reasons and a copy of that statement shall be given to every party to the proceedings as soon as may be practicable.'

Time limits

8. The tribunal's chairman gave the claimant the decision notice on 23 March. The claimant's representative set a fax asking for a statement on 23 April. That was 'within one month': see *R(IB) 4/02* at paragraph 15. Does it matter that it was not picked up until later?

9. Regulation 2(a) of the Social Security and Child Support (Decisions and Appeals) Regulations 1999 provides that

'2. Where ...-

(a) any notice or other document is required to be given or sent to the clerk to the appeal tribunal ..., that notice or document shall be treated as having been so given or sent on the day that it is received by the clerk to the appeal tribunal ...'

10. When was the application received by the clerk – when the fax was transmitted or when it was collected by the clerk? This is related to the question: where was the representative entitled to send the application?

11. Regulation 53(4) provides that an application must be made to the clerk of the appeal tribunal. Regulation 2(a) adds to this by providing that time runs until the application is 'received'. Neither specifies where the application may or must be sent. 'Received' is not defined.

12. Receipt clearly emphasises the arrival rather than the despatch of a document. In some contexts, it would mean actual receipt into a person's hands. However, that is not appropriate in this context. The date when a document is received is often of procedural significance. An application for a statement is a case in point. The date can mean the difference between (i) receiving a statement as of right regulation 53(4) and (ii) receiving it only on the exercise of the power to extend time under regulation 54. In that context, it is not appropriate to interpret it as requiring that the document must come into the personal and physical possession of the clerk. It cannot be appropriate that a party's rights should depend on the chance of when a clerk took a document from a fax machine or picked up a letter.

13. I am not aware of any relevant decision on the meaning of 'received'. There are, however, decisions on similar expressions, which provide concepts relevant to interpreting this word in its context.

14. The decision of the Court of Appeal in *Holwell Securities Ltd v Hughes* [1974] 1 All England Law Reports 160 contains one useful concept. The Court discussed the acceptance by post of an option to purchase. Lord Justice Russell said:

'What if the letter had been delivered through the letterbox of the house in due time, but the defendant had either deliberately or fortuitously not been there to receive it before the option period expired? ... The answer might well be that in the circumstances the defendant had impliedly invited communication by the use of an orifice in his front door designed to receive communications.'

15. This reasoning can be applied to the provision of a fax machine. The machine was made available for the use of the parties as a means of communicating with the clerk to the tribunal. Accordingly, successful transmission of a fax to the machine can be treated as receipt by the clerk.

16. The decision of the Court of Appeal in *Van Aken v Camden London Borough Council* [2003] 1 All England Law Reports 552 contains another useful concept. The Court discussed when a document was filed if it was put through the letterbox of the court office. Lord Justice Jonathan Parker drew a distinction between unilateral and transactional acts. A unilateral act does not require any step to be taken by the person receiving the document in order to complete the action. A transactional act does require a step to be taken by the person receiving the document in order to complete the action. The Court decided that filing was a unilateral act that was complete when the document was delivered to the court office.

17. This reasoning can be applied to an application for a statement. The action involved is the making of an application for a statement. The clerk does not need to do anything to complete the action. The application is made once it is received. It then has to be implemented by passing it to the chairman of the tribunal or, if it is late, to a district chairman. But that is a separate stage. Personal and physical control or possession of the document by the clerk is not necessary in order to make the application complete.

18. I have so far decided that an application is made when it is received by a fax machine. I have also decided that this applies regardless of when the clerk to the tribunal actually collects it from the machine. That may be hours or days later. It does not affect the date when the application was received. I still have to decide whether receipt by the fax machine in the Colwyn Bay venue was sufficient?

19. It is clearly not sufficient to fax an application to any fax number used by the appeal tribunals across Great Britain. The fax used must relate in some way to the case to which the application relates. At the least, it must be a fax within the Region.

20. Nor would it be sufficient to fax an application to a casual venue. By this I mean rooms that are hired only as and when used for hearings in, for example, the premises of a local authority. The fax associated with that venue will belong to the occupier of the premises, not to the clerk.

21. I see no reason why the clerk cannot specify the address or fax number to be used. However, this has not been done. The Secretary of State has provided for me a copy of the notes that are given to a claimant along with the decision notice. That is headed by the address and other details of the regional office in Cardiff, but the notes do not stipulate that the application for a statement must be made to that office.

22. The venue at Colwyn Bay is a dedicated venue used by the appeal tribunals. It is not a casual venue. Appeals are heard there regularly. The claimant's appeal was heard there. The venue has a fax. The number of the fax is made known to representatives so that they may communicate with the clerk there, at least for some purposes. In the absence of any directions to the contrary, the claimant's representative was entitled to communicate with the clerk to the tribunal at that venue.

Conclusion

23. I am surprised that this case has come to a Commissioner. I would have thought that, even if the application had been made out of time, it was an appropriate exercise of the power under regulation 54 in the circumstances of this case to extend the time for applying for a statement. However, that was not done.

24. The claimant's representative applied for a statement of the reasons for the tribunal's decision within one month. The tribunal's chairman did not provide those reasons. The tribunal thereby went wrong in law.

25. The chairman is not personally to blame for what happened, as the request for a statement was never put to him. However, the sins of the district chairman are visited upon him and, through him, upon the tribunal. Its decision was wrong in law.

26. I set it aside and direct a rehearing.

**Signed on original
on 29 September 2004**

**Edward Jacobs
Commissioner**

SOCIAL SECURITY ACTS 1992-1998**APPEAL FROM DECISION OF APPEAL TRIBUNAL
ON A QUESTION OF LAW****DECISION OF THE SOCIAL SECURITY COMMISSIONER**

Claim for: Disability Living Allowance
Appeal Tribunal: Stockport
Tribunal Case Ref: U/40/125/2003/01924
Tribunal date: 15 December 2003
Reasons issued: 23 January 2004

1. The decision of the Stockport appeal tribunal sitting on 15 December 2003 is conceded to have been erroneous in law on the grounds explained in the written submission of Mrs H Hawley on behalf of the Secretary of State dated 23 August 2004 at pages 173-4; in particular for lack of sufficient reasons and a failure to address potentially material evidence in the claimant's favour on her renewal claim before determining that she was only entitled to a lower rate of benefit than before. There is no dispute between the parties that on that footing a rehearing of the facts is needed.

2. I accept that concession as rightly made, set aside the tribunal decision, and in accordance with section 14(8)(b) **Social Security Act 1998** remit the case to a differently constituted tribunal for redetermination of all relevant issues on the claimant's appeal against the decision of 23 June 2003 on her entitlement to disability living allowance from and including 13 October 2003 which was the effective renewal date.

(Signed)

P L Howell
Commissioner

28 September 2004