Bulletin 7
167 [SHUT]

SOCIAL SECURITY AND CHILD SUPPORT COMMISSIONERS

Commissioner's File No.: CDLA/2335/01

Starred Decision No: 150/01

*Commissioners' decisions are identified by **case references** only, to preserve the privacy of individual claimants and other parties.*

***Starring** denotes only that the case is considered to be of general interest or importance. It does not confer any additional status over an unstarred decision.*

***Reported** decisions in the official series published by DSS are generally to be followed in preference to others, as selection for reporting implies that a decision carries the assent of at least a majority of Commissioners in Great Britain or in Northern Ireland as the case may be. Northern Ireland Commissioners' decisions are published by The Stationary Office as a separate series.*

*The practice about official reporting of Commissioners' decisions in **Great Britain** is explained in reported case R(I) 12/75 and a Practice Memorandum issued by the Chief Commissioner on 31 March 1987. The Chief Commissioner selects decisions for reporting after consultation with Commissioners. As noted in the memorandum there is also a general standing invitation to comment on the report-worthiness of any decision, whether or not starred for general circulation. However, a decision will not be selected for reporting if it is known that there is an appeal pending against it. The practice in **Northern Ireland** is similar, decisions being selected for reporting by the Northern Ireland Chief Commissioner.*

Any **comments** by interested organisations or individuals on the suitability of this decision for reporting should be sent to:

Ms Kimberli Jones,
Office of the Social Security and Child Support Commissioners,
5th Floor, Newspaper House, 8-16 Great New Street, London EC4A 3BN.

so as to arrive by 6th March 2002

Comments on Northern Ireland Commissioners' decisions will be forwarded to the Northern Ireland Chief Commissioner.

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. I allow the claimant's appeal. I set aside the decision of the Warrington appeal tribunal dated 23 November 2000 and I substitute my own decision which is that the claimant's entitlement to disability living allowance did not cease from 24 November 1999 on the ground that he had failed without good cause to submit to medical examinations.

REASONS

2. The claimant suffers from osteoarthritis and had been entitled to the higher rate of the mobility component of disability living allowance since its inception on 6 April 1992. On 22 November 1999, the Disability Living Allowance Unit of the Benefits Agency received a memorandum from the claimant's local Benefits Agency office saying that he had commenced therapeutic work delivering newspapers. Payment of disability living allowance was suspended from 24 November 1999 while enquiries were made. The claimant was asked to attend a medical examination but refused to do so. A report was obtained from his general practitioner but it was regarded as inconclusive and the claimant was asked whether he would attend another examination. He again refused. On 26 May 2000, he was told that he would not be paid any disability living allowance because he had failed to attend two consecutive appointments for medical examinations and had not given good reasons for doing so. The claimant appealed.

3. The Benefits Agency failed to send a representative to the hearing before the tribunal and provided a wholly inadequate written submission. The submission made no reference to the legislation under which it had been decided that the claimant was not entitled to disability living allowance. It had much correspondence attached to it but there was no evidence of any appointments for medical examinations having been made (which was necessary in this case, given the terms of the decision, even if it was not required by any legislation) and there was no copy of the decision letter of 26 May 2000 (although that turns out not to have been significant because it was no more informative than the submission itself). The claimant did attend the hearing. He told the tribunal that he had at first refused to attend an examination because he regarded it as unnecessary as the information could be obtained from his general practitioner. His second refusal had been on "human rights" grounds. He said that, since the termination of his award of benefit, he had offered himself for examination but the offer had not been acted upon. The tribunal went on to consider whether the claimant was virtually unable to walk. They concluded that he was not. The upheld the Secretary of State's appeal on the grounds that the "appellant had failed to attend for medical examination on 2 consecutive occasions and the tribunal did not consider that the appellant was virtually unable to walk". The claimant now appeals against the tribunal's decision with my leave.

4. I have had the advantage of a very helpful submission from Mr Steven Shaw on behalf of the Secretary of State. He has produced not only the letter dated 26 May 2000, notifying the claimant of the decision that he was not entitled to disability living

allowance, but also a copy of the "Action Sheet" (form DBD530) on which the actual decision was made on 24 May 2000. He explains that a decision-maker writes a code on the form. I presume that then leads to the appropriate form of decision letter being issued. However, as Mr Shaw says, there was no code for generating a decision under the legislation under which a decision should have been made in this case. Accordingly, the decision-maker has used what Mr Shaw describes as the "least inappropriate" code available. There is nothing wrong with having an automated system for issuing decisions but it must produce decisions in conformity with the legislation. Indeed, one of the advantages of a degree of automation when it is properly set up is that it can help to ensure that decisions are made in conformity with the legislation. However, as Mr Shaw concedes, the decision in this case was made without any regard to the legislation at all. That may be why none was cited to the tribunal but the submission writer should have paused to consider whether the decision under appeal had been properly made if no legislation could be cited to support it.

5. The statutory provision which should have been considered is regulation 19 of the Social Security and Child Support (Decisions and Appeals) Regulations 1999. Regulation 19(1) enables the Secretary of State to require a person to submit to a medical examination where he considers it necessary to satisfy himself as to the correctness of an award of a "relevant benefit" (as defined in section 8(3) of the Social Security Act 1998), other than incapacity benefit which is subject to different legislation. Regulation 19(2) to (4) provides:

> "(2) The Secretary of State or the Board may suspend payment of benefit in whole or in part, to a person who fails, without good cause, on two consecutive occasions to submit to a medical examination in accordance with requirements under paragraph (1), except where entitlement to benefit is suspended on an earlier date other then under this regulation.
>
> (3) Subject to paragraph (4), the Secretary of State or the Board may determine that the entitlement to a relevant benefit of a person, in respect of whom payment of such a benefit has been suspended under paragraph (2), shall cease from a date not earlier than the date on which payment was suspended except where entitlement to benefit ceases on an earlier date other than under this regulation.
>
> (4) Paragraph (3) shall not apply where not more than one month has elapsed since the first payment was suspended under paragraph (2)."

The form of decision given in this case suggests that regulation 19(3) was in contemplation. However, as Mr Shaw submits, regulation 19(3) can come into play only where benefit has been suspended under regulation 19(2) and where the case falls within regulation 19(4). In the present case, neither of those conditions was satisfied. Benefit was suspended *before* there was any suggestion that the claimant should attend a medical examination – and the suspension was therefore presumably under regulation 16 rather than under regulation 19(2) – and more than a month had elapsed since the suspension. Accordingly, the Secretary of State was not entitled to determine that entitlement to benefit should cease merely because the claimant had

failed to submit to medical examinations. The tribunal erred in law in not holding that the decision under appeal was erroneous.

6. When I granted leave to appeal, I raised the question whether the tribunal was entitled to go on and consider whether the claimant was virtually unable to walk so as to satisfy the conditions of entitlement to the higher rate of the mobility component of disability living allowance. Mr Shaw submits that they were entitled only to consider the questions raised by regulation 19(3) of the 1999 Regulations. I do not agree, particularly as the Secretary of State had never referred to regulation 19 in the first place. Section 12(8)(a) of the Social Security Act 1998 provides that an appeal tribunal "need not consider any issue that is not raised by the appeal" before them, but it does not prohibit them from doing so (see CI/531/00). I do not see why, subject to compliance with the rules of natural justice, a tribunal that considers an award to have been terminated for the wrong reason should not consider whether it could properly have been terminated on other grounds, if they consider that they have sufficient evidence before them.

7. As I have held the tribunal to have erred in their approach to the claimant's refusal to attend medical examinations, I must now decide whether to consider upholding the tribunal's decision as to the claimant's ability to walk, which requires me to consider how to exercise the discretion conferred by section 12(8)(a) in circumstances that are slightly different from those at the time of the hearing before the tribunal. The circumstances are different for two reasons. First, I have held that the Secretary of State terminated the award of disability living allowance on impermissible grounds, so that the question whether the claimant was virtually unable to walk is of practical importance in a way that it was not when the tribunal considered, or should have considered, how to exercise the discretion conferred by section 12(8)(a). Secondly, if it was necessary for him to do so, Mr Shaw would support the claimant's original ground of appeal against the tribunal's decision, which was that the tribunal had failed to explain why they had decided that the claimant was virtually unable to walk, given his evidence as to the slow rate at which he could make progress on foot. I have reservations about Mr Shaw's concession but the fact that he has made the concession is relevant to my exercise of the discretion arising under section 12(8)(a) and I am prepared to accept the implied premise behind the concession, which is that the evidence before the tribunal was not such that the only decision the tribunal could reasonably have given was that the claimant was not virtually unable to walk.

8. There is a third consideration, which was relevant before the tribunal and remains relevant now. The claimant had told the tribunal that, after the termination of the award of benefit, he had offered to attend a medical examination and that offer had been rebuffed. If that offer was made, it should not have been rebuffed by the Secretary of State. A refusal to submit to examination does not bar a claimant from entitlement to benefit for all time. If an award is properly terminated under regulation 19(3) of the 1999 Regulations, the termination is effective only until the claimant makes a new claim. In the present case, if, as he says, the claimant offered to submit to a medical examination, he should have been told he could make a new claim for benefit and that a medical examination would then be arranged (compare R(IB) 1/01 and R(IB) 2/01, both decided in the context of the legislation concerning examinations in respect of incapacity benefit). The tribunal could have taken the view

that the claimant's evidence to them made it unnecessary for there to be a medical examination, but I have not heard the evidence first hand and am not inclined to take that view.

9. None of those three considerations is determinative but having regard to all of them, I am content not to consider whether the tribunal erred in their decision that the claimant was virtually unable to walk and I therefore give the decision in paragraph 1 above, which is more or less in the form suggested by Mr Shaw. As Mr Shaw says, although the decision reinstates the original award of disability living allowance, it does not preclude the Secretary of State from continuing to suspend payment under regulation 16 of the 1999 Regulations while he considers whether to supersede the award on the ground that the claimant has not satisfied, or has not continued to satisfy, the conditions of entitlement to disability living allowance. Mr Shaw says that the Secretary of State may wish to consider whether the claimant's refusal to submit to medical examinations suggests that he had something to hide. No doubt he will consider that point, but I suggest that the claimant's expression of a willingness to attend a medical examination made to the tribunal – and, on his account, to the Secretary of State before then – may somewhat undermine the inference that could otherwise be drawn from his previous refusal to submit to examination. I suggest that no decision should be made to supersede the current award without the claimant being offered a further opportunity of a medical examination.

(signed) **M. ROWLAND**
Commissioner
12 December 2001