Bulletin 167 7
CSHeat

SOCIAL SECURITY AND CHILD SUPPORT COMMISSIONERS

Commissioner's File No.: CDLA/2795/01

Starred Decision No: 135/01

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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.

File no: CDLA 2795 2001

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1 I allow the appeal.

2 The appellant is appealing with my permission against the decision of the Chesterfield appeal tribunal on 15 December 2000 that the appellant was not entitled to either component of disability living allowance from and including 10 May 2000.

3 For the reasons below, the decision of the tribunal is erroneous in law. I set it aside. I refer the appeal to a differently constituted tribunal for determination in accordance with the directions given in this decision (Social Security Act 1998, section 14(8)(b), (9)).

The issues in the appeal

4 The appellant put forward three grounds of appeal: that the tribunal was biased in the way it handled the evidence; that it had applied the wrong test in law about preparing a main meal; and that it had ignored the evidence about her ability to walk.

Handling the general practitioner's evidence

5 In its statement of reasons (produced five months after the hearing despite a request being made within a week of the hearing), the tribunal took strong views about the evidence. As between the appellant and the examining medical practitioner it concluded that it "preferred the report of the examining medical practitioner ... because his evidence was disinterested and informed whilst the evidence of the appellant was neither." There was also evidence from the appellant's general practitioner. If this the statement said:

> "The general practitioner's report was in some respects at variance with the examining medical practitioner's and the Tribunal felt that the general practitioner was likely to be under some pressure from the appellant which would render the examining medical practitioner's report preferable."

The comment of the appellant on this was:

> "I think the tribunal's decision was wrong because the tribunal preferred the examining medical practitioner's report because they stated I put my general practitioner under pressure to present a report in my favour. This was not the case and the tribunal should have decided on the merits of both reports in an unbiased way."

I granted permission to appeal on that ground. The secretary of state's representative indicated that the appeal is supported on that ground.

6 The evidence from the general practitioner was in reply to a standard form questionnaire from the Department. There is no suggestion that the appellant asked the general practitioner for any evidence. The general practitioner was required to answer questions such as these under the statutory terms of his contract with the national health service. The questions were asked without reference to any specific claim. They were answered in what appears to be a meticulous way, with more detail

than usual, but without any personal comment. The general practitioner saw the appellant on the day the report was prepared. There is nothing in the form or the replies to suggest otherwise than that the general practitioner has answered professionally the factual questions put, without "steer", bias or pressure. I see no basis whatsoever in that report or elsewhere for the tribunal to jump to a conclusion that the general practitioner was acting in any way unprofessionally in making the report, or that the general practitioner was not "disinterested and informed", the terms used by the tribunal about the examining medical practitioner.

7 By contrast, the report of the examining medical practitioner seems rushed, not least when compared with the examining medical practitioner report made in 1997. The general practitioner gave four diagnoses of the appellant's problems, as did the first examining medical practitioner. The second examining medical practitioner gave only one, and did not comment on the other problems. One of these was degenerative disc disease, which was confirmed as present both in 1997 and in January 2000. It was unlikely to have disappeared in April 2000 when the second examining medical practitioner report was prepared.

8 The tribunal's statement says that the tribunal looked at the report of the second examining medical practitioner as "disinterested and informed", and relied on it. The statement also says that the tribunal "considered all the evidence". Despite using all the right phrases, the tribunal statement ignores the evidence both from the first examining medical practitioner report and the report from the general practitioner. The report of the first examining medical practitioner was discounted because "the tribunal is not bound to follow any previous decision awarding benefit for an earlier period", and the evidence of the general practitioner because of the suspicion of bias. Neither are mentioned at all in the lengthy balancing act the statement sets out about the evidence of the examining medical practitioner report and the appellant, despite the clear relevance of both. If that was the approach taken by the tribunal (rather than a belated rationalisation of its conclusion) then in my view the appellant was right to accuse the tribunal of bias in its attitude to bias. If there were grounds for the tribunal's suspicions, they are not mentioned anywhere in the record of the tribunal or detectable in the papers. The excessive and, as far as I can see, totally unfounded suspicion with which it has treated the evidence of the general practitioner has led the tribunal to weigh the evidence unfairly. The tribunal decision must be set aside and the case reheard.

The cooking test

9 The issue is of additional importance because the tribunal, apparently ignoring specific evidence of the general practitioner and also of the examining medical practitioner in the first report, found that the appellant may not be able to prepare meals on some days but "most of the time she ought to be able to cook for herself". That must be reconsidered. But the representative argued that the tribunal also erred in law because it was enough for the appellant to show that she could not cook on some days. I do not accept that ground of appeal.

10 The legislation requires that entitlement to allowance arises for someone who is so severely disabled physically or mentally "for any period throughout which ...

he cannot prepare a cooked main meal...": Social Security Contributions and Benefits Act 1992 section 72(1). In R (DLA) 2/95 the Commissioner stated:

> " The main meal must be cooked on a daily basis... The test depends on what a claimant can do without help on each day."

11 As the Chief Commissioner for Northern Ireland recently commented generally about that decision in C 41/98 (DLA), the reference in R(DLA) 2/95 to "each day" is not part of the legislation (although the representative suggests it is in the grounds of appeal). It has to be read in the context of the accepted view that the approach is to take "a broad view of the matter": R (A) 2/74. At one extreme, the test cannot be met by the occasional ability to meet it. The benefit is a weekly benefit, and the test has to be met retrospectively for three months before a claim and prospectively for six months after it, so there must be some permanence and some recurrence. Equally, the occasional ability to prepare a cooked main meal is not sufficient to stop a claim. It also depends whether the problem is that a claimant cannot perform the activities at all or that they cannot be done safely. Where the line is drawn is a question of fact. If as a result one tribunal awards benefit where another does not, it does not mean that one is "right" and the other "wrong". Both may be "right" in the sense that they have reached their decisions without error of law.

My decision

12 The papers are defective. It is stated that the appellant was in receipt of the lowest rate of the care component because of an inability to cook with effect from 17 March 1997. That decision is not in the papers. The decision stopping the lowest rate of the care component is also not in the papers. It is said to have been on 10 May 2000 with effect from that date. Nor is there any indication of the basis on which the Secretary of State found grounds to supersede the previous decision, if he did. If it was on the basis of a change of circumstances, what were the original circumstances, and what has changed? It is also not clear whether the decision said to be under appeal dealt with the mobility component at all. If it did not, is the mobility component relevant to this appeal? It is because I do not know what is under appeal (and nor did the tribunal, which failed to deal with any of these deficiencies) that I cannot deal with this case myself. I must refer it to a new tribunal.

13 The Secretary of state is directed to ensure that a proper submission is put before the new tribunal with full details of the decisions in 1997 and 2000 and with all relevant supporting papers. The new tribunal is to ignore the findings and reasons of the previous tribunal.

David Williams
Commissioner

14 November 2001