7

Bulletin 164

[Short]

SOCIAL SECURITY AND CHILD SUPPORT COMMISSIONERS

Commissioner's File No.: CDLA/2878/2000

Starred Decision No: 61/01

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

Mr Damien Abbott,
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 10th August 2001

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

1. The decision of the Social Security Appeal Tribunal dated 26 April 2000 is erroneous in law. I set that decision aside and direct that the claimant's case be heard again by a differently constituted tribunal.

2. The claimant appeals, with my leave, against the tribunal's decision that the claimant is not entitled to an award of the mobility component of Disability Living Allowance from and including 31 August 1999 and is not entitled to an award of the care component of that allowance for the same period.

3. The statement of the tribunal's findings in fact and of the reasons for its decision is in the following terms:-

> " 1. [The claimant] is 29. She claimed Disability Living Allowance on 31 August 1999.
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> 2. [The claimant] started with back pain in March 1998 which was due to a slipped disc. On the 10 June 1999 she went to the Dominican Republic and her back deteriorated while she was away. She did not return to work as a staff nurse upon her return on 23/6/99. Her mobility was restricted and she had care needs. On the 17 December 1999 she had an operation on her back which has been successful.
>
> 3. She returned to full-time work as a staff nurse on 14/2/2000. She works from 8.30 a.m. until 4.30 p.m. she told the Tribunal in evidence that she has not required any attention at night since January 2000 and that she could walk 50 yards without severe discomfort upon her return to work. There is no evidence before the tribunal that she satisfies the conditions for an award of DLA from and including 14/2/2000 nor was [the claimant] suggesting that she qualified for any award from that date.
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> 4. The date of claim is the 31/8/99. Sections 72(2)(b) – in respect of the care component – and section 73(9)(b) – in respect of the mobility component – of the Social Security Contributions and Benefits Act 1992 require that a person satisfies the conditions for an award of benefit for a period of 6 months which period begins at the end of the 3 month qualifying period. If the tribunal made an award from the date of claim and accepted that the qualifying period had been satisfied by that date they are unable to make it for 6 months as there is no evidence that [the claimant] qualifies for any award from and including 14 February 2000.

4. The essence of the claimant's reasons for disputing the tribunal's decision is in the following extract from her statement of grounds for appealing the tribunal's decision to a Commissioner:-

> "At the time of my application (31 August 1999) it was likely that I would have my mobility problems and care needs for at least 6 months, and even the DLA1 form asks the question 'Do you think you will have these problems for at least 6 months.' please see enclosed copy.
>
> I feel that the tribunal should have considered my claim from the date of my application. i.e. 31.8.99, and not from the date of the tribunal 26.4.00. This was discrimination against myself because the tribunal agreed that I have satisfied the conditions and had they made a decision on 31.8.00 I would have been granted DLA.

I would also like to point out that at the time I completed the application I was unaware that I would need an operation within 6 months, I was therefore likely to have my condition for the foreseeable future, and if it were not for an operation, the condition would have remained for the rest of my life.

I refer also to the DLA96 form (enclosed). I have highlighted the relevant section. This section also states that you are entitled to DLA when you are likely to need help from the date of your claim for 6 months or more. I feel this further supports my appeal.

Having read all the literature including the Social Security Contributions and Benefits Act 1992, I have been unable to find a statement that stipulates that I must have the condition for 6 months following the date of application. All the literature appears to state that I must be likely to have the condition for 6 months following the date of application.

In the light of the above I would ask that you reconsider the decision of the Tribunal as I feel that my claim should have been considered from 31.8.99 and the factors at that time should have been taken into account.".

5. Section 72(2)(b) provides:-

"[The claimant] is likely to continue to satisfy one or other of [the disability conditions] throughout –

(i) the period of 6 months beginning with [the date on which the award of the care component would begin]; or

(ii) (if his death is expected within the period of 6 months beginning with that date) the period so beginning and ending with his death.".

Section 73(9)(b) provides:-

"He is likely to continued to satisfy one or other of [the disability conditions specified in subsections (1) to (5)] throughout –

(i) a period of 6 months beginning with [the date on which the award of the mobility component would begin]; or

(ii) (if his death is expected within the period of 6 months beginning with that date) the period so beginning and ending with his death.".

6. The functions of the adjudication officer have been transferred to the Secretary of State by section 1 of the Social Security Act 1998. The Secretary of State's representative does not support the claimant's appeal. In a written submission of 19 October 2000 she says that she understands the grounds of the claimant's appeal to be that the tribunal has breached section 12(8)(b) of the 1998 Act by taking into account circumstances which arose after the date of the adjudication officer's decision on 21 October 1999. Those circumstances are the

cessation of the claimant's need for attention in connection with her bodily functions and the cessation of her virtual inability to walk.

7. Section 12(8) of the 1998 Act provides:-

> "In deciding an appeal under this section, an appeal tribunal –
>
> (a) ... and
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> (b) shall not take into account any circumstances not obtaining at the time when the decision appealed against was made.".

The Secretary of State's representative argues that the tribunal has not breached section 12(8)(b). What it did was to consider the evidence available at the date of its decision in order to establish what were the circumstances prevailing at the time at which the claim for benefit was made and decide what was likely at that time. She refers to Commissioners' decisions CIB/4792/99, CDLA/14396/96 and CIB/5978/97 as authority for her view that the tribunal was entitled to exercise hindsight in that way.

8. I do not think that the claimant had section 12(8)(b) in mind but I agree with the Secretary of State's representative that that provision does not prevent a tribunal from using evidence which becomes available after the date of the adjudication officer's or the Secretary of State's decision to decide what were the prevailing circumstances at or before the date of that decision. That is made clear in CDLA 2934/99 and CDLA/4734/99 which both deal with the effect of section 12(8)(b). Both decisions point to the distinction between the evidence which is to be gathered from a change in circumstances arising after the date of the decision under appeal and the changed circumstances themselves.

9. The claimant's point, as I understand it, is that:-

> (1) the tribunal was obliged to ascertain what, as at the date of claim and in the light of the information available at that date, was the likelihood of her continuing to satisfy the disability conditions for the next 6 months and
>
> (2) If, on the evidence available at the date of claim, the claimant was likely to satisfy the disability conditions for the next 6 months benefit should have been awarded irrespective of her unexpected recovery of mobility and capacity for self care.

10. The question of whether or not a decision maker or an appeal tribunal can exercise hindsight in order to come to a conclusion as to the likelihood of the circumstances prevailing at the date of claim continuing to prevail thereafter was first dealt with in Commissioner's decision R(A) 1/94. In that case the statutory provision in issue was section 35(2C) of the Social Security Act 1975 which provided that a claimant for Attendance Allowance was to be treated as terminally ill (and, therefore, entitled to the allowance) if –

> "he suffers from a progressive disease and his death in consequence of that disease can reasonably be expected within 6 months.".

The mother of a seriously ill infant who had been awarded Attendance Allowance payable 6 months after the infant's birth (6 months being the qualifying period) applied for the awarding decision to be reviewed on the grounds that section 35(2C) had applied since the date of the infant's birth. A departmental official wrote to the consultant paediatrician who had the care of the infant and asked "Is [the infant] terminally ill i.e. likely to die within 6 months?". The infant had been born on 31 August 1990. The question was put to the paediatrician on 11 November 1991. On 15 January 1992 he answered to the effect that as the infant had survived to that date he was unable to answer the question. On 26 March 1992 a Delegated Medical Practitioner decided that "in the light of the evidence" the infant did not satisfy the conditions of sections 35(2C). The Commissioner, accepting a submission for the Secretary of State, decided that the Delegated Medical Practitioner should have directed his mind to the position as it was at the date of the application for review, 28 January 1991, rather than to the irrelevant consideration that by the date of the determination the infant had lived for more than 6 months. In other words, the Commissioner took the view that the section 35(2C) question was to be answered by reference to what was known at the date of claim (or in the case before him the date of application for review), not by reference to subsequent events.

11. That decision is referred to by Mr. Commissioner Henty in CDLA/14396/1996. He was dealing with an appeal relating to section 73(9)(b) of the 1992 Act. That case was very similar to the one before me. A tribunal refused an award of the mobility component of Disability Living Allowance because by the time of its decision it was clear that the claimant had not been virtually unable to walk throughout the period of 6 months from the date of claim. The claimant's argument was that the tribunal was required to put itself into the position as it was at the date of claim and, ignoring what had actually happened thereafter, ask itself the hypothetical question of whether on the evidence available at the date of claim the claimant was likely to be virtually unable to walk for the next 6 months following that date. The Commissioner accepted that there was some support for that argument in R(A) 1/94 but it involved the tribunal deciding the case on the basis of a state of probability prevailing at the date of claim which it knew had not continued throughout the 6 months.

12. As authority for the view that the exercise of hindsight was permissible in cases such as CDLA/14396/96 the Commissioner referred to the House of Lords decision in Bwllfa and Merthyr Dare Steam Collieries v. Pontypridd Waterworks Company 1903 A.C. 426 in which Lord McNaughton said that in an arbitration as to the loss suffered by Bwllfa in having to cease mining operations in order to protect the water undertaking the loss was to be ascertained by reference to what, at the date of the arbitration, was known, as a result of post cessation evidence, to be the value of the works foregone rather than by reference to the value which could have been estimated at the date of cessation on the evidence available then.

13. Commissioner Henty referred also to the judgment of Megarry J in Simpson v. Jones 1968 1 WLR. 1066. That was an income tax case in which the taxpayer's liability for tax would have been assessed erroneously if based on accounts which were known to have wrongly omitted an outstanding judgment debt. Before the accounts were corrected the creditor released the taxpayer from a substantial part of the debt. Megarry J, applying the Bwllfa principle, decided that the amount which should be included in the corrected accounts and taken into account in the tax assessment was the reduced debt. The basis of the tax assessment was to be what was known to be the actual liability at the end of the financial year in question rather than what had been thought in that year would be the liability.

14. However, Commissioner Henty acknowledged that a contrary view was indicated by the House of Lords decision in the case of the Defence Secretary v. Guardian Newspapers [1985] 1 A.C. 339. In that case a civil servant had supplied a newspaper with a Ministry of Defence document which was classified as secret. The newspaper claimed that by virtue of section 10 of the Contempt of Court Act 1981 it could not be required to disclose the source of its information and said that it would return the document only after deletion of markings which could identify the civil servant concerned. In interlocutory proceedings in the High Court it was held that the Crown was entitled to delivery of the document. The exceptions to the protection afforded to the newspaper's sources of information by section 10 applied because the interests of "justice" and "national security" necessitated the immediate return of the document. An order for the delivery of the document was made and the newspaper appealed.

15. By the time the appeal against that interlocutory order had reached the House of Lords it had already been established in criminal proceedings that there was in fact an issue of national security. However, both Lord Diplock and Lord Roskill specifically remarked on the requirement for them to perform the mental gymnastics of ignoring the information gained in the course of the criminal proceedings and deciding the validity of the interlocutory order in the light of the knowledge available to the High Court at the date of the making of the order.

16. As well as referring to the Guardian case Commissioner Henty bore in mind R(A) 1/94. He decided, but only for the purposes of the case before him, that the tribunal had erred in law in exercising hindsight and that, though his conclusion might seem to be lacking in commonsense, the tribunal should have exercised only foresight. He then went on to substitute his own decision which was that all the evidence available at the date of claim would inevitably have led a tribunal to the conclusion that it was unlikely that the claimant would continue to be virtually unable to walk for the period of 6 months following that date.

17. The Secretary of State's representative, in her written submission, refers me to another decision of Mr Commissioner Henty, CIB/5978/1997, in which he considered the interpretation of the version of regulation 27(d) of the Social Security (Incapacity for Work) (General) Regulations 1994 which was in force until 6 January 1997. That was:-

> " 27. A person who does not satisfy the All Work Test shall be treated as incapable of work if in the opinion of a doctor approved by the Secretary of State –
>
> (a) ...
>
> (c) ...; or
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> (d) he will within 3 months of the date on which the doctor so approved examines him have a major operation or other major therapeutic procedure.".

18. The claimant in CIB/5978/1997 was, at the time at which he was examined by an examining medical practitioner for the purposes of the All Work Test, waiting for a coronary angiogram. The tribunal decided that the claimant could not be treated as incapable of work by virtue of regulation 27 because at the time of the examination the angiogram was not expected to take place within 3 months. The Commissioner pointed out that as a result of the

decision in R. v. Secretary of State for Social Security Ex parte Moule Q.B. Divisional Court, 12.9.96, regulation 27 had to be read as if the references to the opinion of a doctor approved by the Secretary of State had been deleted. The question arising in the application of head (d) was, therefore, simply whether or not the procedure would take place within 3 months of the date on which the doctor examined the claimant. The Commissioner decided that regulation 27 did apply to the claimant. That was because although the examining medical practitioner had expressed no opinion as to whether or not the angiogram would take place within 3 months of his examination of the claimant the evidence available at the date of the tribunal's decision was that it did in fact take place within that 3 months period.

19. I do not think that CIB/5978/1997 is of any assistance to me in deciding this appeal. The question relevant to head (d) of the version of regulation 27 with which Commissioner Henty was dealing was, as he said, the question of whether or not at the date of the medical examination the claimant would in fact undergo a major operation or other major therapeutic procedure within 3 months. The question which arises under sections 72 and 73 of the Contributions and Benefits Act 1992 is of a different nature. It is whether at the date of claim it was likely that a claimant who at that date suffered the qualifying level of disability would continue to suffer that level of disability for the ensuing 6 months.

20. In CIB/4792/1999, to which also the Secretary of State's representative refers me, Mr Commissioner Levenson dealt with the question of whether or not a tribunal was entitled to apply hindsight to the resolution of the question arising under regulation 27(2)(c) of the Incapacity for Work (General) Regulations as brought into force on 6 January 1997. That version of regulation 27 is different from that in force at the time of the CIB/5978/97 decision and in paragraph (2) provides for 3 circumstances in which a claimant shall be treated as incapable of work. The third of those is:-

> "(c) There exists medical evidence that he requires a major surgical operation or other major therapeutic procedure and it is likely that that operation or procedure will be carried out within 3 months of the date of a medical examination carried out for the purposes of the All Work Test.".

A tribunal had decided that regulation 27(2)(c) did not apply in the case of the claimant with whom it was concerned because the operation for which he was waiting at the time of the examining medical practitioner's examination was not a major surgical operation.

21. Commissioner Levenson, following CIB/14667/1996, decided that the operation in question was a major surgical operation for the purposes of regulation 27(2)(c). However, he went on to decide that regulation 27(2)(c) did not assist the claimant because at the date of the examining medical practitioner's examination there was no real evidence that an operation was likely to take place within 3 months and that the strongest evidence in most cases as to whether an event was likely to happen when looked at from the perspective of some past date is whether it has actually happened when looking back from a subsequent date. The Commissioner cited the Bwllfa case and Simpson v. Jones as authority for his view that the tribunal could take account of circumstances prevailing at the date of its hearing as evidence of what had been, at the date of the examining medical practitioner's examination, likely to happen in the next 3 months. He cited also in re Goodwin (Deceased) [1968] 3 All ER 12 and Charles v. Hugh James Jones and Jenkins (a firm) [2002] 1 All ER 289. He said that in certain circumstances, which he described, certain evidence would raise a rebuttable presumption as to what, at the relevant date, has been the likely course of events.

22. The Goodwin case concerned the application of section 1(1) of the Inheritance (Family Provision) Act 1938 as amended by Intestates Estate Act, 1952. The testator made a Will in 1962 after discussion with his wife. The provisions for his wife were based on the testator's assumption as to what would be the amount of the residue of his estate. When he died in 1964 his residuary estate was much less that he had in 1962 expected it to be. The widow applied for an order under the 1938 Act for reasonable provision to be made for her out of the testator's estate. Section 1(1) as amended provided that the Court could make such an order if it "is of the opinion that the disposition of the deceased's estate ... is not such as to make reasonable provision for the maintenance" of the dependant in question. Mr Justice Megarry invoked the Bwllfa and the Simpson v. Jones principles to decide that the question of whether or not the disposition of the deceased's estate made reasonable provision for the maintenance of the dependant in question was to be decided objectively and not subjectively. It was to be decided by reference not just to what was known at the date of testation or at the date of death but also by taking into account supervening events.

23. The case of Charles v. Hugh James etc. concerned assessment of the damages to be awarded against a firm of solicitors which had negligently failed to bring a client's action for damages for personal injury to trial on the due date with the result that the action was struck out. The damages for which the firm was liable was the amount of the damages which would have been recovered had there been no negligence. The Court of Appeal confirmed the judgment of the Court at first instance. That was that the evidence which was relevant to the assessment of the damages which would have been obtained but for the firm's negligence included not only the evidence as to the severity of the client's injuries which was available at the date at which the action should have come to trial but also evidence which had been obtained after that date because in that way the true measure of the client's loss due to the firm's negligence would be established.

24. The latest authority on the admissibility of post hoc evidence is the House of Lords decision in the case of Phillips and Another v. Brewin Dolphin Bell Lawrie Ltd and Another reported in The Times on January 23, 2001. That case concerned the operation of a provision of the Insolvency Act 1986. The action was raised by the administrator and receiver of a company in liquidation. Section 238 of the 1986 Act provides a remedy for the creditors of a company which goes into liquidation within 2 years of entering into a transaction at an undervalue. In the Phillips case events which occurred after the date of a particular pre-liquidation transaction rendered worthless the consideration which the company had accepted in return for its performance of its part under a complicated arrangement with other companies the object of which was the sale of the company's stockbroking business to the defendants. The House of Lords decided that in arriving at the value of the transaction the liquidator was not restricted to the evidence of the value of the consideration available at the date of the transaction but could also take account of subsequent events which affected what was truly the value at that date.

25. In his opinion in Phillips Lord Scott said:-

> "In valuing the covenants as at [the date of the transaction], the critical uncertainty was whether the sub-lease would survive for the 4 years necessary to enable all the four £312,500 payments to fall due, or to survive long enough to enable some of them to fall due, or come to an end before any had fallen due.

> Where the events, or some of them, on which the uncertainties depended had actually happened, it seemed unsatisfactory and unnecessary for the court to wear blinkers and pretend that it did not know what had happened.".

However, in the paragraph following that Lord Scott says:-

> "Problems of a comparable sort might arise for judicial determination in many different areas of the law. Answers might not be uniform but might depend upon the particular context in which the problem arose.".

26. How should all those authorities be applied in this case? It seems to me significant that in the cases of Bwllfa, Simpson v. Jones, In Re Goodwin (Deceased), Charles v. Hugh James Jones and Jenkins, and Phillips and Another v. Brewin Dolphin etc. the problem was to ascertain as accurately as possible what was the actuality at a particular past date. I note that in Charles v. Hugh etc the view of the judge at first instance, whose judgment was approved by the Court of Appeal, was that the defendant firm's negligence lay not merely in its failure to bring its client's action for damages to trial on the due date but also in its failure to obtain before the due date the evidence which was subsequently obtained and which established what was the true extent at that date of the client's injuries.

27. The issue in those cases is to my mind quite different from the issue for a decision maker or an appeal tribunal in the application of any of section 72(2)(b), section 73(9)(b) or regulation 27(2)(b). In the case of sections 72 and 73 the question is what at the date of claim was likely to have been the future duration of the claimant's current, at the date of claim, satisfaction of the disability conditions. In the case of regulation 27(2)(c) the question is whether or not at the date of the examining medical practitioner's examination it was likely that the claimant would undergo the required surgical operation within the following 3 months. In all three cases the question is "what was the likelihood?" not "what was the actuality?" at the relevant date. I think that the guidance as to the correct approach to the resolution of that question, where there is evidence of supervening events, is to be found in the opinions of Lord Diplock and Lord Roskill in the Guardian Newspaper's case, in R(A) 1/94 and in the cautionary paragraph of Lord Scott's opinion in the Phillip's case which I quote above rather than in the Bwllfa etc cases.

28. I agree with Commissioner Levenson that in the application of regulation 27(2)(c) where there was little or no evidence at the date of the examining medical practitioner's examination that the required operation was likely to take place within the 3 months subsequent evidence that it in fact did not take place within that period will tend to establish that at the relevant date there was no likelihood of it taking place. I differ from Commissioner Levenson slightly in that I do not think any presumptions are raised. It is purely a matter of the evaluation of evidence.

29. However, there is a difference between the questions which arise for decision makers in the application of sections 72(2)(b) and 73(9)(b) on the one hand and regulation 27(2)(c) on the other. In the latter case the question is whether or not at a particular date a particular event was likely to occur within the prescribed period. In the former case the question is whether or not a claimant who has established that at the date of claim she satisfied the disability conditions for entitlement to benefit was, as at the same date, likely to continue to satisfy those conditions for at least 6 months. That question is to be decided by reference to the prognosis for the claimant as known at the date of claim. I do not accept that an

unforeseen supervening failure to continue to comply with the disability conditions occurring within the 6 months period eliminates the likelihood of continued compliance with those conditions which had already been established at the date of claim. There must be evidence that at the date of claim the possibility of the supervening event was known and was sufficiently strong to create the probability that the disability conditions would not be satisfied throughout the ensuing 6 months.

30. I do not think that my interpretation of sections 72(2)(b) and 73(9)(b) produces an artificial situation. Indeed, I think that it allows for the realities for some claimants of the onset of disability. A claimant who at the date of claim thinks that her disability is going to continue for 6 months or more will probably start making arrangements which will cost money in order to cope with it. In the instant case, for example, the claimant says that she had to give up her flat and go to live with her parents because she could not cope with her disabilities on her own. I can see that a claimant, thinking that she is in for a long period of difficulty, might make other arrangements such as committing herself to the hire-purchase or rental of a car or the engagement of paid help which arrangements she would not have made if she had known that in fact her disablement would be cured or substantially alleviated within the 6 months period.

31. My conclusion is, therefore, that although the tribunal had respectable reasons for its decision, it has in the light of the authorities which are relevant to sections 72(2)(b) and 73(9)(b) misdirected itself in law by simply applying evidence of the, according to the claimant, unexpectedly early alleviation of her disabilities to the resolution of the question arising under those provisions. On that account I have set its decision aside. The tribunal which rehears the claimant's case will have to take evidence and make findings in fact as to:-

(a) Whether at the date of claim the claimant satisfied the relevant disability conditions and had done so for the previous 3 months and

(b) whether on the basis of what was known at the date of claim the claimant was, at that date, likely to continue to satisfy those conditions for the following 6 months.

If the tribunal finds that the answers to both (a) and (b) are in the affirmative it should award benefit from the date of claim to the date on which the claimant, on the evidence, ceased to satisfy the relevant conditions for entitlement provided the date of cessation falls before the date of the decision maker's determination. If the date of cessation falls after the date of the decision maker's determination the tribunal must make an open-ended award of benefit and leave it to the Secretary of State to supersede the award with effect from the date of cessation. That is because section 12(8)(b) of the 1998 Act prohibits the tribunal from making a decision wholly or partly on the basis of circumstances arising after the date of the adjudication officer's decision.

33. For the foregoing reasons the claimant's appeal succeeds, inasmuch as I have set the tribunal's decision aside, and my decision and directions are in paragraphs 1 and 31 above.

(Signed) R J C Angus
Commissioner

(Date) 27 March 2001