

SOCIAL SECURITY AND CHILD SUPPORT COMMISSIONERS

Starred Decision No: *78/99

(Commissioner's File No.: CDLA/2934/99)

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

*Mrs M Alayande
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 _____ **2000**

Decision:

1. My decision is as follows. It is given under section 14(8)(b) of the Social Security Act 1998.
 - 1.1 The decision of the South Shields Disability Appeal Tribunal held on 18th February 1999 is erroneous in point of law: see paragraphs 10 to 13.
 - 1.2 Accordingly, I set it aside and, as it is not expedient for me to give a decision on the claimant's appeal to the tribunal, I refer the case to a differently constituted Appeal Tribunal for determination.
 - 1.3 I direct the Appeal Tribunal that rehears this case to conduct a complete rehearing in order to decide whether at any time from the date of claim (27th February 1998) down to the date of the adjudication officer's decision (15th September 1998) the claimant satisfied the conditions of entitlement to any rate of either component of Disability Living Allowance.

The Appeal Tribunal must deal with the evidence at the rehearing in accordance with paragraph 9.

The history of the case

2. On 15th September 1998, an adjudication officer decided that the claimant was not entitled to any rate of either component of Disability Living Allowance. This decision was given on a review under section 30(1) of the Social Security Administration Act 1992.
3. In early October 1998, the claimant appealed to a Disability Appeal Tribunal against that decision.
4. On 18th February 1999, the appeal was heard by a Disability Appeal Tribunal. The tribunal confirmed the adjudication officer's decision. The full statement of the tribunal's decision recorded twice that "we hear" the case on the basis of the evidence that was before the adjudication officer on 15th September 1998.
5. On 17th April 1999, the tribunal's chairman refused leave to appeal. On 19th May 1999, the claimant's application for leave to appeal to the Commissioner was received in the Commissioners' Office. The file was referred to me on 16th September 1999 and I granted leave to appeal on 20th September 1999. I granted leave on the ground that the tribunal may have wrongly restricted itself to evidence that was before the adjudication officer. I directed that if the adjudication officer agreed, a short statement to that effect would be sufficient and that I would give a decision on the appeal without further reference to the claimant.
6. On 14th October 1999, the adjudication officer made a short submission supporting the ground identified in the grant of leave and inviting me to give a decision under the fast-track procedure. This procedure allows appeals that are likely to succeed to be identified at an early stage so that the Commissioner may be able to give a decision without reasons. As I am

satisfied that the appeal must succeed and that only short reasons are required, I have given a reasoned decision without resort to the fast-track procedure.

7. On 18th October 1999, the Social Security Act 1998 was brought into force in respect of Disability Living Allowance. The Act abolished the title and status of adjudication officers, transferring their functions to officers acting in the name of the Secretary of State. From 18th October 1999, the Secretary of State replaced the adjudication officer as a party to this appeal. The Act also abolished Disability Appeal Tribunals, transferring their existing cases to the new and nameless Appeal Tribunal. The claimant's appeal will be reheard by the new Appeal Tribunal.

The law

8. Section 33(7) of the Social Security Administration Act 1992 provides that a Disability Appeal Tribunal

“shall not take into account any circumstances not obtaining at the time when the decision appealed against was made.”

That provision was inserted by paragraph 3(2) of Schedule 6 to the Social Security Act 1998. It applied only to appeals made on or after 21st May 1998, the date when the 1998 Act received the Royal Assent.

9. Section 33(7) limits the tribunal's jurisdiction to the claimant's entitlement. In the case of a claim for a Disability Living Allowance, the jurisdiction is limited to the inclusive period from the date of claim to the date of the decision under appeal. The effect is also to limit the evidence that is relevant to the appeal. The only evidence that is relevant is evidence that relates to the period over which the tribunal has jurisdiction. However, it is the time to which the evidence relates that is significant, not the date when the evidence was written or given. It does not limit the tribunal to the evidence that was before the officer who made the decision. It does not limit the tribunal to evidence that was in existence at that date. If evidence is written or given after the date of the decision under appeal, the tribunal must determine the time to which it relates. If it relates to the relevant period, it is admissible. If it relates to a later time, it is not admissible.

The error of law

10. In this case, the tribunal appears wrongly to have limited itself to the evidence that was before the adjudication officer.

11. The claimant told the tribunal that his disablement at the time of the hearing was the same as that at the date of the adjudication officer's decision. The tribunal's statement records that the claimant had had a serious operation on 8th January 1999 and was now recovering. Although the statement does not say this in so many words, the implication is that although the claimant was recovering from his operation, he was nevertheless worse than he had been at the date of the adjudication officer's decision. That may have been correct. However, that did not mean that by appropriate questioning the tribunal could not have obtained relevant evidence from the claimant as to his condition at the relevant time, perhaps by comparison

with his condition at the date of the hearing. The tribunal was not entitled to reject the claimant's oral evidence on the ground that it was not before the adjudication officer. The same point applies with greater force to the claimant's evidence in his letter of appeal to the tribunal which was written about 2 weeks after the adjudication officer's decision. This evidence was also covered by the tribunal's blanket rejection.

12. There was also evidence from one of the claimant's GPs (page 97). It was dated 3rd November 1998. The doctor certified for the purposes of the Orange Badge scheme that with the use of a walking stick the claimant could only walk for less than 50 metres without stopping, severe discomfort or help from someone else. The tribunal should have investigated in order to relate that evidence to the claimant's disablement at the relevant time. It did not do this.

13. I would not want to base my decision on an inappropriate use of the word "hear" in the tribunal's statement. So, I have considered whether the tribunal may have meant that it "preferred" the evidence that was before the adjudication officer. However, this cannot be the case. This is shown by the tribunal's treatment of the evidence for the Green Badge Scheme. This evidence was not specifically mentioned in the statement. It was not even one of the pieces of evidence expressly "noted" by the tribunal in the first paragraph of the statement. Also, there was no explanation of why it was rejected. This lack of reference supports the conclusion that this evidence was not considered by the tribunal.

The scope of this decision

14. The reasoning in this decision covers the following provisions, all of which are in the same terms as section 33(7).

14.1 Section 22(8) of the Social Security Administration Act 1992, which was inserted by paragraph 3(1) of Schedule 6 to the Social Security Act 1998.

14.2 Section 20(5) of the Child Support Act 1991, which was inserted by paragraph 9 of Schedule 6 to the Social Security Act 1998.

14.3 Section 12(8)(b) of the Social Security Act 1998.

14.4 Section 20(7)(b) of the Child Support Act 1991, as inserted by section 42 of the Social Security Act 1998.

Summary

15. The tribunal's decision is erroneous in law and must be set aside. I cannot give the decision which the tribunal should have given on its findings of fact and it is not expedient for me to make further findings of facts. There must, therefore, be a complete rehearing of this case before a differently constituted Appeal Tribunal in order to determine the claimant's proper entitlement to Disability Living Allowance at all times within the period of the tribunal's jurisdiction. The Appeal Tribunal will decide afresh all issues of fact and law on the basis of the evidence available at the rehearing in accordance with my directions. As my

jurisdiction is limited to issues of law, my decision is no indication of the likely outcome of the rehearing, except in so far as I have directed the Appeal Tribunal on the law to apply.

**Signed: Edward Jacobs
Commissioner**

Date: 21st October 1999