Bulletin 181
[illegible]

CDLA 2998 2003

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1 I dismiss the appeal.

2 The claimant and appellant is appealing with my permission against the decision of the Swansea appeal tribunal on 2 May 2003 under reference U 03 204 2002 02879. For the reasons below, the decision of the tribunal was not wrong in law.

Background to this appeal

3 The claimant, Miss N, was entitled to the higher rate of the mobility component and lowest rate of the care component from and including 21 August 2000. Although she was only 36 at the time, she was suffering from lumbar disc degeneration, sciatica, and either rheumatoid arthritis or osteoarthritis (different diagnoses are given) in her hands, plus depression. Miss N claimed on 1 March 2000. The decision awarding the allowance was made in December 2000 as a revision of a decision (not in the papers) made in May.

4 A new claim form was submitted in February 2002. In March an incapacity benefit approved doctor's report was faxed from the Haverfordwest Benefits Agency Office to the DLA Office with a cover note stating "as requested". It is not clear why it was requested. The claimant did not mention either it or the award of a relevant benefit in the claim. It resulted in disability living allowance being disallowed from 26 March 2002. That was later revised to move the end of award to 1 May 2002.

5 When Miss N appealed, her solicitors sent the DLA Unit a copy of a general practitioner report prepared in connection with her incapacity benefit appeal. It comments specifically and in detail on the approved doctor's report. This led to the revision of the date on which the allowance was stopped. Nothing happened for some months. The solicitors then wrote to the appeal tribunal enclosing papers about Miss N's incapacity benefit appeal. It had gone to a tribunal and then a deputy Commissioner. The deputy Commissioner upheld the appeal in CIB 4687 2002 and sent it for rehearing. The decision is strongly critical of the way that the tribunal preferred the evidence of "the BAMS doctor" and is also specifically critical of the approved doctor's report.

6 The disability living allowance tribunal awarded the lowest rate of the care component from 2 May 2002 but refused either level of the mobility component. As the grounds of appeal from Miss N relate only to the mobility component, I do not consider the award of the care component.

The mobility component

7 The papers show that the decision superseding the award of the mobility component was made on the basis of the approved doctor's report in December 2001. Further, the decision to revoke the previous award was made from the week on which the DLA Unit received the approved doctor's report. That report claimed that the doctor had seen Miss N walking 200 yards - a claim that Miss N strongly refuted. The DLA Unit also seems to have decided that it could use this report rather than ask for another examining medical practitioner report. The submission to the tribunal, however, uses standard wording for examining medical practitioner reports to support the report of "someone practiced in making such assessments" in making its submission to the tribunal. It added that in this case

the Benefits Agency asked for an oral hearing and said it would send a presenting officer. None was sent.

Use of the approved doctor's report

8 Aspects of the use of the approved doctor's report in this case concern me. There is no necessary connection between an incapacity benefit claim and a disability living allowance claim, so why was one made here? There appears to be no system under which the DLA Unit asks for approved doctor's reports on a neutral basis - that is, such that the DLA Unit cannot pick and choose when it produces approved doctor's reports and when it does not produce them. There also appears to have been no system in place to ensure that full disclosure was made about the appeal involving the approved doctor's report. The submission to the tribunal was silent about the appeal.

9 In CIB 4331 2001 the Commissioner commented on a case that was the reverse of this. There a disability living allowance report made shortly before an incapacity benefit examination was not available to the tribunal considering the incapacity benefit appeal. The Commissioner set aside the decision of the tribunal because, after full consideration, he concluded that the examining medical practitioner's report for disability living allowance was "such potentially important evidence, and was so readily available, that it should have been called for" by the incapacity benefit tribunal. I respectfully agree with what I consider to be the principles behind this conclusion. These are that (a) a medical report prepared about a claimant for one benefit can be made available in connection with a claim by that claimant for another benefit; (b) in some cases fairness means that it should be made available; and (c) in appropriate cases where it is not available but has been put in issue, the tribunal should obtain it before reaching a decision. That third point is necessary because, looking at CIB 4331 2002 and this case together, an inevitable question arises. Why was the incapacity benefit evidence obtained by the DLA Unit in this case, and why was the DLA evidence not obtained by the incapacity benefit office in that case?

10 The secretary of state's representative confirmed that incapacity benefit medical reports are not routinely requested when considering disability living allowance cases. There is no formal procedure or other instruction for obtaining such reports or the analysis of details in those reports. Further "as IB reports are not normally sought in respect of DLA claims/ applications, it follows that there are no formal procedural or other instructions in place to ensure any subsequent comments on the report(s) are drawn to the attention of the DLA. I am advised, however, that there is an ongoing trial in the Glasgow Centre to test the usefulness of obtaining IB reports in DLA claims."

11 I note what the secretary of state's representative says, but express concern about one aspect. It is fundamental to the production and use of any evidence that those who seek to rely on the evidence before a court or tribunal make full disclosure. If, therefore, the Secretary of State (or claimant) wishes to rely on the report of an approved doctor in a disability living allowance appeal, and there is a directly relevant challenge to, or other development concerning, the approved doctor's report, the disability living allowance tribunal must be told of this. In this case, the duty to inform the tribunal was even clearer. The DLA Unit was put on notice that the incapacity benefit decision was under appeal in July 2002 by the appellant's solicitors. Yet nothing was noted about it in any submission to the disability living allowance tribunal when it heard the case in May 2003. That is plainly wrong. It amounts to a failure to disclose directly relevant information of which the DLA Unit was aware. This is aside from any need to make further enquiry or any implications of the Court of Appeal decision in *Secretary of State v Hinchy* [2003] EWCA Civ. 138, under

which the DLA Unit may be assumed to know anything that the local incapacity benefit office knows. If the DLA Unit has to be instructed to make any necessary enquiry, then in my view it should be so instructed. Tribunals should where necessary check the position.

12 Another aspect of the fair production of evidence is that it should be clear why the additional evidence is obtained (or, in this case, why the approved doctor's report was used in place of an examining medical practitioner report) when the process is not automatic. That is not obvious from these papers, and the tribunal should again be on guard that the production of reports in this way is fair.

13 In this case the solicitors provided a copy of CIB 4687 2002 strongly criticising the approved doctor's report. The tribunal took this into account and rightly placed a heavy discount on the evidence of the approved doctor. While, therefore, I consider it right to criticise the way the Secretary of State presented the case to the tribunal, Miss N's solicitors ensured that this caused no injustice in the decision. Instead, the tribunal relied on the evidence of Miss N herself and that of her general practitioner. That evidence is set out fully in the tribunal statement of reasons, and I need not repeat it. The grounds of appeal for the appeal are essentially a challenge to the accuracy of the record of the tribunal on the facts. The tribunal clearly weighed all the evidence before it and clearly did have evidence (other than that of the approved doctor) that called in question Miss N's entitlement to the higher rate of the mobility component. I do not find any error of law in the way the tribunal handled the evidence put before it. It applied the right test in the light of that evidence and I accept the validity of its decision.

14 Was the decision wrong in law on the lower rate of the mobility component? The tribunal considered the evidence of falls. It formed the view that Miss N did not pose a danger to herself. In so doing, it explained the evidence on which it preferred to rely and why. There was no other basis in the evidence for considering the lower rate of the mobility component. It is not a "lower rate" of the higher rate. The grounds of appeal restate Miss N's concern about falling when out, and putting this as the need for supervision. I see no new point in this. It is again a restatement of Miss N's view of the facts. I do not accept that the tribunal was wrong in law on this area either.

David Williams
Commissioner

25 November 2003

[Signed on the original on the date shown]