

Bulletin 167 7
[SHER.]

SOCIAL SECURITY AND CHILD SUPPORT COMMISSIONERS

Commissioner's File No.: CDLA/3324/01

Starred Decision No: 140/01

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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.

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 Cardiff appeal tribunal, held on 2nd February 2001, is erroneous in point of law.
 - 1.2. I set it aside and remit the case to a differently constituted appeal tribunal.
 - 1.3. I direct that appeal tribunal to conduct a complete rehearing of the issues that arise for decision in accordance with my interpretation of section 72(2)(b) of the Social Security Contributions and Benefits Act 1992.

In particular, the tribunal must determine the claimant's entitlement to a disability living allowance on her claim that was treated as made on 26th April 2000.

If the tribunal makes an award, it must not begin before 26th April 2000 and it must end at the latest on 26th September 2000.

The appeal tribunal must not take account of circumstances that were not obtaining at the date of the decision under appeal: see section 12(8)(b) of the Social Security Act 1998, as interpreted in *R(DLA) 2 and 3/01* and *CJSA/2375/2000*.

In dealing with the mobility component at the lower rate, the appeal tribunal must apply the reasoning of the Tribunal of Commissioners in *R(DLA) 4/01*.

The appeal to the Commissioner

2. This is an appeal to a Commissioner against the decision of the appeal tribunal brought by the claimant with the leave of a district chairman. The Secretary of State supports the appeal.

The issue

3. The claimant's claim for a disability living allowance was treated as made on 26th April 2000. It was refused and the claimant exercised her right of appeal to an appeal tribunal. By the time of the appeal hearing, she had made another claim on which an award had been made. The effective date of that award was 27th September 2000, but the tribunal only knew that it was sometime in September 2000. The tribunal would have awarded a disability living allowance consisting of the care component at the lowest rate on the basis of the cooked main meal test. However, it considered that it could not make that award because of the qualifying conditions. They are set out in section 72(2) of the Social Security Contributions and Benefits Act 1992:

'...a person shall not be entitled to the care component of disability living allowance unless-

(a) throughout-

(i) the period of three months immediately preceding the date on which the award of that component would begin ...

he has satisfied or is likely to satisfy one of more the conditions mentioned in subsection (1)(a) to (c) above; and

(b) he is likely to continue to satisfy one of other of these conditions throughout-

(i) the period of six months beginning with that date'.

4. The tribunal's reasoning was this. The claimant did not begin to satisfy the conditions for an award until 28th April 2000, when her chemotherapy started. So the qualifying period in section 72(2)(a) was not satisfied until 28th July 2000. That was the earliest date on which the award could begin. The effect of the other qualifying condition in section 72(2)(b) was that the award had to run for at least 6 months. But six months after 28th July 2000 was within the period covered by the award that began in September 2000. So, the tribunal could not make an award.

5. The issue is: does section 72(2)(b) determine the minimum period of the award or merely the minimum period for which the conditions of entitlement have to be satisfied?

6. The tribunal's interpretation of section 72(2)(b) was wrong for these reasons.

7. First, it is not what the provision says. The provision does not in its term limit the period of an award that can be made. It only imposes a requirement that it must be likely that one of the conditions set out in section 72(1) will be satisfied for a further 6 months. Those conditions are but one part of the conditions that must be satisfied before an award can be made. Section 72(2)(b) does not impinge on those other conditions. In particular, it does not refer to, or affect the operation of, section 71(3), which deals with the period of an award.

8. Second, it would be irrational if section 72(2)(b) prevented an award for less than 6 months. If the tribunal's interpretation is correct, the claimant is worse off than if she had not made a fresh claim. A fresh claim is an obvious and sensible step to take for two reasons. It may result in a decision more quickly than an appeal. Second, it allows deterioration to be taken into account. The tribunal's interpretation of section 72(2)(b) effectively requires a claimant to gamble which of those two courses is more likely to be advantageous. The claimant could, of course, pursue an appeal and then make a fresh claim if the appeal was unsuccessful. But that would leave a potential gap in a claimant's entitlement between the date of the decision under appeal and the date of the fresh claim. The tribunal could not consider any deterioration after the date of the decision under appeal and an award on the fresh claim could not begin earlier than the date of claim.

9. In practice, section 72(2)(b) will often fix the minimum period of an award at 6 months. But that is not because it imposes that limit directly. It only has this effect because the

claimant's disablement is not likely to last for 6 more months. If that disablement is likely to last for longer, it is irrelevant that part of that period is covered by a later award.

10. This reasoning applies to section 73(9), which makes equivalent to section 72(2) for the mobility component.

Why have I directed a rehearing?

11. As the tribunal recorded the award that it would have made, I could have made that award myself without directing a rehearing. It is perhaps arguable that a different award might be appropriate, so I have directed a rehearing.

Signed on original

**Edward Jacobs
Commissioner
22nd November 2001**