(7)

Bulletin 165

SOCIAL SECURITY AND CHILD SUPPORT COMMISSIONERS

Commissioner's File No.: CDLA/~~3466/01~~ 3364/2000 [Content]

Starred Decision No: 133/01

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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 OF SOCIAL SECURITY COMMISSIONER

1. The claimant's appeal is allowed in part. The decision of the Sunderland Appeal Tribunal (the tribunal) dated 29 February 2000 is in error of law and I set it aside. Under section 14(8)(a)(i) of the Social Security Act 1998 I substitute my own decision, as I can do so without making fresh or further findings of fact. The decision is:-

> **The decision of the adjudication officer (AO) dated 7 October 1996 on care is invalid. There was no jurisdiction to alter a life award of the middle rate care component of disability living allowance (DLA) from 7 April 1994 made by an AO on 18 June 1994 and that award therefore continues to run.**
>
> **From the date of a review application lodged 19 October 1995 by the claimant until the date of the tribunal hearing, the claimant is not entitled to the highest rate of care component DLA nor to the mobility component thereof at either rate.**

The issue

2. The primary issue in this appeal, which has followed an extremely protracted course, is whether information obtained by an AO in breach of section 32(4)(b) of the Social Security Administration Act 1992 (the AO breach) can nevertheless qualify as information available to the tribunal, founding its jurisdiction under section 33(6)(ii) of the Social Security Administration Act 1992 (the Act) to consider a component of DLA awarded for life.

3. There were other subsidiary issues raised by the appeal. However, given my decision on the above, it is unnecessary for me to decide these, except in so far as they relate to the tribunal decision on the claimant's review application.

Background

4. The award made by an AO on 18 June 1994 of middle rate care component of DLA from 7 April 1994 for life on account of frequent day attention needs was based on self assessment. The claimant did not then claim any mobility requirements or night needs.

5. On 19 September 1995, the DLA unit received an internal memo, called an MF40, stating that the claimant had been found capable of work after an all work test . On 3 October 1995, the Secretary of State requested a DLA review "because of information received from local office". A review claim pack was sent to the claimant, which was returned on 19 October 1995. This gave a similar picture with respect to day attention needs as in the original claim but the claimant now said she required help to the toilet at night and had difficulty in walking. Her general practitioner (GP) gave her disabling conditions as back pain and carpal tunnel syndrome.

6. The AO arranged a visit by an examining medical practitioner (EMP1), who reported on 8 January 1996 with respect to care only. It was EMP1's opinion that the claimant required help with some bodily functions when her back was stiff and painful but that using pain-killing tablets such help should be required only occasionally.

7. On 15 March 1996, the DLA unit received a copy of a report dated 5 December 1995 carried out by an examining medical officer (EMO2) for the purposes of the all work test. On the basis of this report, the claimant in fact satisfied the all work test. Moreover, from its date, it could not be the report which was the subject of the MF40. Notwithstanding, on 2 April 1996 the AO reviewed the decision dated 18 June 1994 (the original DLA decision) for relevant change of circumstances. The revised decision was that the claimant was not entitled to the care component from and including 5 December 1995.

8. On 1 May 1996, the claimant requested review because of more trouble with her back and arm than previously. She was sent a claim pack, which she returned completed on 27 June 1996. This repeated her day attention requirements and her difficulties with walking but denied any night needs.

9. On 7 October 1996, another AO carried out an any grounds review (the decision under appeal). This confirmed the disentitlement by the first AO of any care component and also held that she was not entitled to either rate of mobility component DLA. A GP report dated 30 October 1996 was then received (GP report), which had been requested by the AO much earlier. This gave some support to the claimant's case, particularly mobility. The GP said she had seen the claimant that day.

10. On 15 December 1996, the claimant appealed to a tribunal. Throughout the proceedings, both to a tribunal and to the Commissioner, she has acted through the local welfare rights service (the representative). The first tribunal hearing on 17 July 1997 was adjourned to obtain an examining medical practitioner report on mobility as well as care and also a copy of a report dated 29 August 1995 by an examining medical officer (EMO1) for the purposes of the all work test.

11. The second examining medical practitioner report, dated 8 August 1997 (EMP2), therefore addressed both mobility and care. It was EMP2's opinion that she had no attention needs and that she could walk 200 metres before the onset of severe discomfort but with possible stops, so that it might take her 6-10 minutes to walk that distance.

12. After a further adjournment because the report of EMO1 was not available, a disability appeal tribunal was convened 18 February 1998 which had both EMO reports and the reports of EMP1 and EMP2. The EMO1 report was clearly the one on which the information in the MF40 was based. Using that EMO1 opinion, she did not pass the all work test. The disability appeal tribunal on 18 February 1998 held that the claimant was not entitled to any award of DLA. However, with the consent of the parties, on 22 October 1998 the Commissioner set the decision aside because the tribunal on 18 February 1998 failed to state what review ground was relied on.

13. On 11 September 1999, another examining medical practitioner (EMP3) visited and examined the claimant. Presumably this report was directed by a District Chairman. Like that of EMP2, the report covered both mobility and care. It was the opinion of EMP3 that the claimant could walk in excess of 250 metres before the onset of severe discomfort with no halts, there were no attention requirements and that, at least so far as mobility was concerned, the situation had been the same for five years.

14. After two further adjournments, due firstly to lack of time and secondly to lack of the appellant, the tribunal on 29 February 2000 determined the appeal. The claimant was present at the hearing with the representative. The tribunal reviewed and revised the award of the middle rate care component of DLA and removed entitlement from 8 January 1996 (the date of EMP1's report). The tribunal also held that the claimant was not entitled to either rate of the mobility component DLA from and including 19 October 1995, the date of receipt of the claim pack in which the claimant first raised mobility difficulties.

15. The tribunal regarded the AO review of the life award as defective, because it removed entitlement from 5 December 1995 with no supporting medical evidence to found a change of circumstances then. The tribunal considered it had its own power of review under section 33(6) of the Act and was satisfied that the report of EMP1 provided evidence of "facts about the appellant's disabilities as to which the AO making the earlier decision was mistaken". The tribunal relied for its conclusions, both on care and mobility, on the three EMP reports. These were preferred to the EMO reports because the latter are concerned with the all work test rather than DLA. The EMP reports were also preferred to the GP report:-

> "The tribunal considers that the appellant's GP has relied heavily on the history taken from the appellant in giving her opinion. As the tribunal has already explained, it has found some of the appellant's evidence contradictory. It follows, therefore, that the tribunal prefers the EMP's expert assessment based on a clinical examination to the report from the GP."

Statutory criteria

16. For convenience, I set out the statutory provisions applicable to the review of the claimant's life award of DLA. The provisions were in Part II of the Act until repeal for DLA purposes on 18 October 1999. Furthermore, the provisions set out are as they stood at the date of the Secretary of State's application to review care and the claimant's application for review to award mobility:-

> "*Attendance allowance, disability living allowance and disability working allowance*
>
> **Reviews of decisions of adjudication officers**
>
> 30.-(1) On an application under this section made within the [period of three months starting when AO decision was given to claimant], a decision of an adjudication officer ..... which relates to ..... a disability living allowance .... may be reviewed on any ground .....
> (2) On an application under this section made after the end of the [above period], a decision of an adjudication officer ..... which relates to ..... a disability living allowance may be reviewed if –
>
> (a) the adjudication officer is satisfied that the decision was given in ignorance of, or was based on a mistake as to, some material fact; or
> (b) there has been any relevant change of circumstances since the decision was given; or

(c) it is anticipated that a relevant change of circumstances will so occur; or

(d) the decision was erroneous in point of law; or .....

.....

(7) A question may be raised with a view to a review under this section by means of an application made in writing to an adjudication officer stating the grounds of the application .....

.....

(12) ..... where a claim for a disability living allowance in respect of a person already awarded such an allowance by an adjudication officer is made or treated as made during the period for which has been awarded the allowance, it shall be treated as an application for a review under this section.

.....

Reviews of decisions as to attendance allowance, disability living allowance or disability working allowance – supplementary

32 –(1) An award of ..... a disability living allowance ..... on a review under section 30 above replaces any award which was the subject of the review.

.....

(4)Where a person has been awarded a component for life, on a review under section 30 above the adjudication officer shall not consider the question of his entitlement to that component or the rate of that component or the period for which it has been awarded unless –

(a) the person awarded the component expressly applies for the consideration of that question; or

(b) information is available to the adjudication officer which gives him reasonable grounds for believing that entitlement to the component, or entitlement to it at the rate awarded or for that period, ought not to continue.

.....

Appeals following reviews

33 – (1) Where an adjudication officer has given a decision on a review under section 30(1) above, the claimant ..... may appeal –

(a) ..... to a disability appeal tribunal .....

.....

(6) The tribunal shall not consider –

(a) a person's entitlement to a component which has been awarded for life; or

(b) the rate of a component so awarded; or

(c) the period for which a component has been so awarded, unless –

(i) the appeal expressly raises that question; or

(ii) information is available to the tribunal which gives it

> reasonable grounds for believing that entitlement to the component, or entitlement to it at the rate awarded or for that period, ought not to continue."

17. Two amendments were introduced to the above on 1 July 1997 by the Social Security Administration (Fraud) Act 1997. Following those amendments a new section 30(7A) of the Act was inserted as follows:-

> "The Secretary of State may undertake investigations to obtain information and evidence for the purposes of making applications [to review]."

18. Section 32 (4)(b) after amendment read:-

> "there has been supplied to the adjudication officer by the Secretary of State, or is otherwise available to him, information which gives him reasonable grounds for believing that entitlement to the component, or entitlement to it at the rate awarded or for that period, ought not to continue."

The judicial authorities

19. Both the parties in the appeal to the Commissioner agree the following:-

(a) "reasonable grounds for believing" in both s.32(4)(b) and s.33(6)(ii) of the Act means:-

> "evidence which is capable – before being balanced against evidence favourable to the claimant – of amounting to grounds for revision of the award. Evidence that gives grounds for suspicion is not enough" (see paragraph 18 of CDLA/5793/97).

(b) If that threshold test is satisfied, the AO or tribunal may proceed further and look at the facts in detail. Until then, each is barred from initiating investigation to produce such reasonable grounds (unless the appeal expressly raises the question, which is the alternative way of satisfying the preliminary condition).

(c) Once the required reasonable grounds for believing are present, the AO or a tribunal must still determine whether a ground for review is made out under s.30(2) of the Act (and, if yes, whether revisal is appropriate). The necessary two-stage process, satisfaction of s.32(4) or s.33(6), followed by satisfaction of a ground under s.30(2) of the Act, was confirmed by the Court of Appeal in *Ashraf v Secretary of State*, 2 December 1999.

(d) If either the AO or a tribunal consider a component of DLA which is the subject of a life award without the threshold test being passed, the resultant decision is erroneous in law. In the case of an AO decision, the tribunal on appeal should declare it invalid and in the case of a tribunal decision, a commissioner will set it aside as in error of law.

(e) The judicial authorities are divided, however, on the primary issue in this appeal. This is whether a tribunal, having held the AO's decision to be invalid, may then use the information obtained by the AO breach, as information available to the tribunal which could pass their own threshold test and give the requisite jurisdiction to consider the award further.

20. Numerous cases have been cited to me both in written and in oral submissions by the parties and I have directed their attention to some others. I deal first with those authorities which support the claimant's case and, secondly, with those which support that of the Secretary of State.

Information obtained by the AO in breach of s.32(4) does not qualify as information available to the tribunal under s.33(6)

21. The three strongest authorities in support are decisions of Commissioner Walker QC, CSDLA/121/97 (★18/98), CDLA/2375/97 and CSDLA/181/99.

22. In ★18/98, the claimant had a DLA award for life of mobility component at the lower rate. The award was ceased by an AO on the ground of a relevant change of circumstances. The Commissioner held that the AO had acted in breach of s.32(4)(b) of the Act because he relied on a doctor's report which he obtained after the application giving rise to the possibility of a review. He had therefore begun to consider the question of entitlement to the protected award before he had reasonable grounds so to do.

23. In the event, the Commissioner considered that the doctor's report was not sufficient factually to provide reasonable grounds, whether or not it could otherwise be utilised by a tribunal to found jurisdiction under s.33(6). But the Commissioner said at paragraph 11:-

> "Nonetheless I must record some concern about what then appears to be a rather circular position, namely that evidence tainted by illegality because obtained by one level of the adjudication system dealing with an application can then lose that taint if it comes before a higher level on appeal. I am rather concerned that such a rule, were it correct, could be of little practical value. Either side could appeal to have the 'illegal' material brought into consideration. I am somewhat attracted to the simplistic view that evidence once tainted remains so for all purposes in respect of the same application and any appeal thereon. I suspect that such a view might better equate with the principle that a tribunal on an open appeal is rehearing the whole matter with the powers and in the position of the adjudication officer below."

24. In CDLA/2375/97, Mr Commissioner Walker returned to the same issue and the material obtained from the AO breach *was* capable of providing reasonable grounds for a tribunal if it could use that information. The Commissioner decided in the negative. He founded on the inherent unfairness of allowing the AO to raise an issue about the propriety of a life award at the tribunal stage, based upon evidence he had not been entitled to obtain and which he might, or might not, have put aside for his own purposes. He noted, however, that the Secretary of State had a power to investigate the circumstances of any claim or question and there was no bar on the Secretary of State instituting enquiries in a life award case:-

> "When transferring the matter to the adjudication officer he would have included all the relevant material which would then undoubtedly have included information 'available' to the adjudication officer prior to his entering upon consideration of the review"(see paragraph 13).

It is noteworthy that this comment precedes the express statutory authority of the Secretary of State, both to investigate and make available any resulting material for the purposes of review, introduced by the 1997 amendments.

25. In CSDLA/181/99, Commissioner Walker reiterated his view that it was unfair to the claimant to allow in at a later stage of adjudication material which had been improperly obtained. The AO had not touched the life award but the tribunal, without any unsolicited evidence which gave reasonable grounds for belief that one of the qualifying grounds to review the award existed, commissioned an EMP report and then based withdrawal of the life protected award on that report. The Commissioner substituted his own decision, which was to restore the former award. However, he questioned whether the material improperly obtained by the tribunal could now be used for the purposes of a fresh review. While accepting that he was not entirely clear upon what legal basis such material could be kept out, he expressed the view that nevertheless it ought not to be so used.

26. There are other decisions which support the above views, although in most of them the point about the AO breach did not arise directly. In CDLA/12826/96 (★57/98), Commissioner Williams noted Commissioner Walker's concern that evidence "tainted by illegality" should be allowed onto the record. At paragraph 22, Commissioner Williams said:-

> "While I share the doubts expressed in CSDLA/121/97 in my view they are not in point here. ..... The method by which the evidence came to light is not in issue".

27. In CDLA/5793/97, Commissioner Rowland affirmed that evidence obtained by a tribunal in breach of s.33(6) of the Act could not be used by any other tribunal considering the case. However, Commissioner Rowland continued, at paragraph 21:-

> "The concept of inadmissible evidence is foreign to tribunals in this jurisdiction but it is the natural consequence of the equally foreign fetter on their inquisitorial jurisdiction that is imported by s.33(6). ..... I doubt, however, that the adjudication officer would have been entitled to rely on the evidence obtained by the first or second tribunals in breach of s.33(6). Untainted evidence would have had to have been obtained and

> that might have affected the date from which the review could have been effective."

28. In CDLA//5552/99, where the facts were similar to those of CDLA/5793/97, Commissioner Mesher discussed CDLA/15976/96. In the last case, Mr Commissioner Jacobs held that, despite the AO breach which he found, on appeal the DAT could rely on the wrongly obtained report as part of the information to be looked at under s.33(6). In paragraph 10 of his own decision, Mr Commissioner Mesher said that:-

> "I do not need to decide whether that was right in the circumstances of CDLA/15976/96 (and there are other Commissioners' decisions casting doubt on that), because the circumstances of the present case are significantly different."

29. CDLA/923/99 again involved a second tribunal after an adjournment using evidence obtained by an earlier tribunal, which the latter should not have sought given the prohibition of s.33(6). Commissioner Powell held that the second tribunal stood in the shoes of the first, so it was equally wrong for the second tribunal to use the evidence improperly obtained. He expressed his attraction to Commissioner Walker's view that:-

> "..... evidence once tainted remains so for all purposes in respect to the same application and any appeal thereon." (see paragraph 7 of CDLA/923/99)

30. Commissioner Powell continued at paragraph 8 thereof:-

> "Reliance has been placed on paragraph 33.3 of decision CDLA/15976/96 where Commissioner Jacobs referred to there being a general principle in the law of evidence that evidence that is improperly obtained is nonetheless admissible. That passage ..... requires extremely careful consideration and too much should not be read into it. The law reports contain many instances where evidence that has been improperly obtained is excluded for one reason or another. In particular, where evidence has been obtained in breach of an express or implied statutory prohibition."

31. In CDLA/702/99, Mr Deputy Commissioner Kirkwood agreed that tainted evidence remained so for all purposes in respect of the same application and any appeal therefrom. However, it was unclear whether the AO or the Secretary of State had obtained the information in question.

Information obtained in breach of s.32(4) can nevertheless qualify as information available to the tribunal under s.33(6)

32. The seminal authority is the decision of Commissioner Mitchell QC in CSDLA/120/97. As always, Mr Commissioner Mitchell set out the issues succinctly. In paragraphs 12 and 13 he said:-

> "In particular, the question arises whether the tribunal decision whose decision was under appeal, or any future tribunal would be entitled, having

held the adjudication officer's decision on the care component invalid under s.32(4) to give consideration at their own hand to the care component under s.33(6) of the Administration Act. .....

(13) In my judgement a tribunal would have jurisdiction to consider the matter as part of the appeal proceedings. The adjudication officer had made a decision (a) refusing the review request on the mobility component of the allowance and (b) revising the award of the care component. The claimant had appealed against both parts of the adjudication officer's decision. The tribunal accordingly had a live appeal against the refusal to revise the award to add the mobility component. Although the AO's decision under s.32(4) was invalid and would require to be held so, nevertheless the tribunal would then have evidence 'available' which they might regard as affording reasonable grounds for believing that the life award or entitlement to it at the rate awarded, or for that period, ought not to continue. ....."

33. This case was preferred, in contrast to Mr Commissioner Walker's views, by Mr Commissioner Jacobs in CDLA/15976/96, referred to above at paragraph 28. Commissioner Jacobs held that a tribunal could take the GP report obtained by the AO breach into account in deciding whether the tribunal itself could consider an otherwise protected life award. This was for the following reasons:-

"33.1 The tribunal did not initiate the gathering of the evidence and there is, therefore, no reason why the evidence should be tainted by the circumstances in which it was obtained so far as the tribunal's use of it is concerned.

33.2 The reasoning of the Commissioners prevents a person at a particular level of adjudication from initiating the gathering of evidence, but does not prohibit reliance on evidence that happens to be available.

33.3 On general principle in the law of evidence, evidence that is improperly obtained is nonetheless admissible."

34. In CSDLA/147/99, it was not clear whether an EMP report had been obtained by the AO in breach of s.32(4). In the event it had, Commissioner May QC preferred the views of Commissioner Mitchell QC in CSDLA/120/97 and Commissioner Jacobs in CDLA/15976/96 to those of Commissioner Walker QC.

35. Mr Commissioner May noted that the recent policy of Scots law was to admit all evidence throwing light on disputed facts. While acknowledging the fears of the claimant's representative that an AO would simply pass on to the tribunal evidence which he could not use, the Commissioner considered that the only limit was on the tribunal investigating without information. At paragraph 20 he said:-

"I find myself inclined to the view that evidence obtained by the adjudication officer which he could not use himself by virtue of the statutory prohibition contained in s.32(4) is not affected by the separate statutory prohibition contained in s.33(6) upon

> the tribunal and does not disable them from using the evidence. That prohibition is related to the actings of the tribunal themselves not to evidence obtained by others. Further I accept [the Secretary of State's] submission that admissibility of evidence is not the issue. ..... Thus 'tainting' of evidence does not arise with the effect that it cannot be used by the tribunal. Even if I were wrong about this on the authorities cited by [the Secretary of State] the evidence could not be excluded from consideration. Mr Commissioner Walker ..... appears to be contemplating a concept of inherent unfairness in the adjudication officer obtaining evidence which he himself cannot use and then praying in aid its use in an appeal by the claimant to the tribunal for the purposes of getting the tribunal to carry out a review. However, even if there is unfairness perceived I do not see that within the scope of the legislation that the use of the information can in fact be prevented. To do so would be to invoke some principle akin to personal bar which I do not think it would be appropriate to adopt standing the nature of the prohibition on the tribunal. Further, as is pointed out by [Secretary of State] there is a balancing act between the interests of the claimant and the interests of the state which pays the benefit. The whole basis of the system is that if someone satisfies the statutory conditions for an allowance he is entitled to it and if not he does not. I consider that this must be correct."

36. The issue is exhaustively considered with her customary care by Mrs Commissioner Brown in C53/98(DLA). In paragraph 13, she notes that:-

> In my view [neither of the relevant sections] has anything to say about admissibility or otherwise of evidence. The admissibility of evidence must therefore be dealt with on much more fundamental legal principles. The rules of evidence are relaxed before tribunals. However, even in a situation of a civil action in a court, evidence is not inadmissible merely because it was improperly obtained."

37. For Commissioner Brown the question is essentially one of jurisdiction. An AO is not even to consider a component which has a life award except in the limited circumstances set out in the relevant sub-section. If he seeks information when he has no jurisdiction to do so, then the decision of the AO is a nullity and should so be declared by the tribunal on appeal. The question is also one of jurisdiction at the tribunal level:-

> "It is only when the factual basis for the reasonable grounds are established that the tribunal has jurisdiction to proceed. It must establish its jurisdiction first." (paragraph 20)

38. Commissioner Brown in the same paragraph points out that the statutory provisions make no reference to the exclusion of relevant evidence and, if such evidence puts an existing award in doubt, it would be very unsatisfactory in the public interest if that award could not be further scrutinised. A tribunal has an inquisitorial duty to explore proper benefit entitlement on the basis of relevant acceptable evidence and general rules of evidence do not make the information obtained by the AO in excess of his powers inadmissible. Therefore, such information is available to the tribunal so that, if it provides the appropriate reasonable grounds, it founds the tribunal's jurisdiction to enter into consideration of the otherwise protected life award.

39. Both Commissioner Pacey in CDLA/1575/00 and Deputy Commissioner White in CDLA/4678/99 take the view that, even if evidence obtained for the review request is "tainted by illegality", this does not prevent the tribunal from having regard to it.

The oral hearing

40. The case came before me for an oral hearing on 25 June 2001, having been adjourned from an earlier listing. The claimant was represented by Mr Guy, a Welfare Rights Officer with Durham County Council, the same representative who has assisted her throughout. The Secretary of State was represented by Mr Brodie, Advocate, instructed by Miss Ritchie, Solicitor, of the Office of the Solicitor to the Advocate General. I am extremely grateful to both for their very helpful submissions and the extremely constructive atmosphere in which the hearing was conducted. This has assisted me greatly in reaching a conclusion, which was not easy having regard to the division of opinion noted above.

41. Mr Brodie conceded at the outset that the AO breach was accepted as such. However, it was contended that the report of EMP1 provided factual reasonable grounds for believing that entitlement to the life award of the middle rate care component DLA should not continue and, after carefully going through the authorities, Mr Brodie urged me to accept that the report could therefore legitimately found the tribunal's jurisdiction under s.33(6). The issue was now seen to be one, not of admissibility of evidence, but of a prohibition on investigation. S.33(6)(ii) of the Act was a stand alone provision and unambiguously phrased. There was no justification to read into it any qualifications such as "properly" or "correctly", so that it impliedly read, for example, "information is correctly available to the tribunal". It was in accordance with public policy that a person should receive a life award only if that was the right entitlement, and fairness to the claimant had to be balanced against that public interest. There is a degree of artificiality if a tribunal is barred from taking into account information in front of it.

42. Mr Guy equally carefully referred to the authorities. He pointed out that both before and after the amendments in 1997, the Secretary of State was able to obtain relevant information and put it before the AO, and such information gave the AO jurisdiction to proceed further. Therefore, the state interest in correct entitlement was adequately protected. But it was inherently unfair that an AO could, perhaps deliberately, breach s.32(4) and the claimant would receive no protection because the tribunal could utilise the information on the appeal which the claimant would be forced to bring. Mr Brodie had argued that there was a point to s.32(4) because most AOs obeyed its restrictions. This was insufficient when there was no sanction to prevent an excess of powers.

43. On the tribunal's refusal to review the award on the claimant's application for review and find her entitled to mobility, Mr Guy stated that the tribunal gave inadequate reasons for preferring the EMP reports to those of the GP. The claimant had seen the GP on the day of the report, and it was therefore inadequate to say that the GP had relied heavily on a history taken from the appellant in giving her opinion. The tribunal was also in breach of the rules of natural justice in relying on CSDLA/246/96 and CSDLA/52/94 for the proposition that a person who can walk 50 yards, albeit slowly and with a limp and even if a rest is involved, before the onset of severe discomfort is not virtually unable to walk. These specific cases had not been put to the parties in argument at the tribunal hearing, and the tribunal was thereby in breach of the rules of natural justice.

My conclusion and reasons

Tribunal jurisdiction

44. I agree with Commissioner Brown in C53/98(DLA) that the issue is one of determining the tribunal's jurisdiction, rather than admissibility of evidence. However, it seems to be assumed that because all evidence is admissible, therefore evidence obtained from the AO breach necessarily founds the tribunal's jurisdiction. In my view, this does not follow.

45. In CDLA/3840/98, Commissioner Howell was satisfied there was no AO breach. Therefore, at paragraph 24 he said:-

> "I would desire to reserve for further consideration, in a case where it is actually material, the question of whether such evidence is to be excluded from all subsequent consideration even by a tribunal on appeal under s.33 or a subsequently initiated review adjudication process. As the Commissioner in case CDLA/5793/97 noted at paragraph 21, the concept of evidence being "inadmissible" or "tainted with illegality", is a foreign one to this jurisdiction. The function of the tribunal is to ascertain the claimant's true entitlement, rather than referee some formalistic game between claimants and the department: and it seems to me that the questions that arise under sections s.32(4) and s.33(6) may be better approached in terms of the limitations Parliament has chosen to impose on the scope of the questions the adjudication officers and tribunals respectively are empowered to determine, rather than by importing what are bound to be artificial restrictions on the "admissibility" of evidence that is actually in existence, and may be highly relevant in reaching the correct answer on any redetermination that takes place."

46. The line of authority relied on by Mr Brodie has, in my view correctly, moved away from the concept that evidential rules have any relevance. Instead, the emphasis is on a statutory prohibition on investigation by adjudicating authorities at the same level. However, it may be that the general policy of the civil law that all relevant evidence should be admitted, has influenced the interpretation of what are the actual terms of the statutory restrictions.

47. Mr Brodie is, of course, right that the first rule of construction is that words and phrases are used in their ordinary meaning. However, it is also an elementary rule that words are read in context. There is a statutory scheme with respect to review of disability living allowance awards and appeals following review. The statutory scheme must be read as a unity.

48. On first principles, review is governed by reference to the legislative powers in existence on the date of the review application. Therefore, adjudication on the Secretary of State's review application in this case was subject to s.32(4) and s.33(6). One AO stands in the shoes of another, and it is likewise with tribunals. If one tribunal is prohibited from considering the possible revision of a claimant's existing award of a DLA component for life, so is any subsequent tribunal adjudicating on that appeal. The tribunal also stands in the same shoes as the AO under appeal except and insofar as the legislation provides otherwise.

49. Under s.32(1) of the Act, an award of DLA under s.30 replaces any award which was the subject of the review. While one meaning of "award" is "a payment or prize", so that it may seem strange to term a decision which removes all entitlement as an award, the word also simply means "a judicial decision". The Commissioners have in fact always taken the approach that a review and revision of the original decision replaces the original decision.

50. Therefore, when the matter comes on appeal to the tribunal, there is no life award in existence. Even if the revision leaves some element of the life award continuing, it no longer has the exact protection available before the AO reviewed and revised it. If the AO acted improperly in so doing, then it is common ground that the tribunal must hold the AO decision to be invalid. At that stage, it thus becomes again the award prior to AO review and revision and the issue arises whether the tribunal has jurisdiction to question it. In my view, it is bizarre if the very same information which revives the protection at tribunal level because due to the AO breach, nevertheless gives the tribunal power to begin consideration afresh. It is already accepted that a second tribunal cannot found on information improperly obtained by a prior tribunal, even though applying the literal construction for which Mr Brodie contends, information would be available to the second tribunal for which it has not itself gone "deliberately scrabbling", to use Mr Brodie's memorable phrase, in order to see if the life award should continue.

51. By s.32(4) and s.33(6) Parliament has clearly intended that review of a life award has special protection. A coach and horses is driven through that protection if tribunals may take into account evidence which was obtained by the AO in excess of his powers. There is also a principle of statutory construction, that one should seek to prevent an abuse of powers. Combining this with reading words in their statutory context, leads me to the inevitable conclusion that, in defining the scope of the question Parliament has empowered the tribunal to determine where review of a life award is in issue on appeal, s.33(6) must be read as if the words "in accordance with the statutory scheme" are implied after the phrase "information is available to the tribunal".

52. It follows that the tribunal should have held the AO's decision under appeal to be invalid. The only information available which questioned the claimant's life care award in order to downgrade it was the information contained in the EMP1 report which had been obtained in breach of s.32(4) and thus not within the statutory scheme. Therefore, the tribunal had no jurisdiction to question that award which revived in its original form as an award of middle rate care component DLA for life from 7 April 1994.

53. As the issue is the narrow one of interpretation of s.32(4) and s.33(6), I am unable to agree that once evidence is tainted it is thereafter always unusable. The relevant sections have now been repealed. This means there is no statutory scheme which prevents the Secretary of State using any of the three EMP reports for the purposes of supersession. The burden of proof will, of course, lie on the Secretary of State to show that from the date of supersession a ground justifying it has been demonstrated and that supersession is correct. But there are no restrictions on jurisdiction nor any special protection for a life award and it has never been the rule that evidence is inadmissible because improperly obtained.

Mobility and highest rate care

54. The claimant herself sought review and revisal on the grounds of entitlement to highest rate care and mobility. It was therefore proper for the tribunal to look at eligibility for

highest rate care, even though care had special protection. Given the inconsistency of the claimant's own statements about night needs and the terms of the accepted EMP reports, it has not been argued that the tribunal's decision was wrong in that respect.

55. The claimant was not previously in receipt of the mobility component. Therefore, no special protection was involved and the tribunal was entitled to obtain medical evidence. As the claimant sought this review and revision, the burden of proof lay on her to demonstrate entitlement. That has not been done and I find no error of law with respect to the tribunal's determination on mobility component.

56. Mr Guy argues that the tribunal dealt inadequately with their preference for the EMP reports to that of the GP. I accept that the GP saw the claimant on the date she completed her report. However, when the tribunal says that appellant's GP relied heavily on the history taken from her, it is not implying that the GP relied on records. "History" is used in the sense of an account, and the tribunal takes the view that the GP relied on an account of her difficulties given by the claimant. The lack of any GP clinical findings is contrasted with the clinical examination contained in each of the three EMP reports. The tribunal as a fact finding body came to a conclusion within their province and which they explained. Accordingly, there is no error of law.

57. Mr Guy also argued that the tribunal was in breach of the rules of natural justice with respect to mobility component in relying on CSDLA/246/96 and CSDLA/252/94 without raising these cases in the hearing and giving him the opportunity of comment.

58. I do not agree. All the tribunal has done is simply refer to two decisions which are supportive of the factual conclusions which the tribunal has reached. The cases do not raise any recent novel principle of law so that in the interests of justice prior notice ought to have been given to the appellant. The views expressed in the statement of reasons constitute the tribunal's opinion on the merits in respect of which support has been found in the case law cited.

Summary

59. The tribunal was in error of law in firstly, failing to set aside the AO decision on care as invalid and secondly, in itself considering the protected life award of middle rate care DLA. The report of EMP1 gave it no jurisdiction to do so and it therefore likewise had no jurisdiction under the reports of EMP2 and EMP3. I do not criticise the tribunal. It did not have the benefit, if such it was, of all the relevant case law, nor the time which I have had to consider the very able submissions put by the parties' representatives.

60. The appeal is allowed in part. There is no remit to a tribunal and my substituted decision is set out in paragraph 1 above.

(signed)
L T PARKER
Commissioner
Date: 5 July 2001