



THE SOCIAL SECURITY COMMISSIONERS

Commissioner's Case No: CDLA/3848/2001

SOCIAL SECURITY ACTS 1992-1998

**APPEAL FROM DECISION OF AN APPEAL TRIBUNAL ON A QUESTION
OF LAW**

DECISION OF THE SOCIAL SECURITY COMMISSIONER

COMMISSIONER: Mr C. Turnbull

Claimant : Mrs. Jean Farrington
Tribunal : Liverpool
Tribunal Case No : U/06/065/2001/00527
Date of Tribunal Hearing : 10 May 2001

1. This is an appeal by the Claimant, brought with my leave, against a decision of the Liverpool Appeal Tribunal made on 10 May 2001. For the reasons set out below that decision was in my judgment erroneous in law. I allow the appeal, set aside the Tribunal's decision and remit the matter for redetermination by an appeal tribunal to be composed of persons none of whom was a member of the Tribunal.
2. The Claimant is a woman who was born on 22 February 1935. She had a heart attack in 1998. On 6 July 1999 she made a claim for disability living allowance. At that time her main disabling conditions were angina and breathlessness on exertion and osteoarthritis in her right hip. She was awarded the higher rate of the mobility component and the lowest rate of the care component (for inability to prepare a cooked main meal), in each case from 6 July 1999 to 5 July 2001.
3. On 26 January 2001 the Claimant signed a disability living allowance claim pack entitled "claiming again for a person aged 16 or over." She had gone into hospital two days previously for an operation to replace her right hip. However, it is apparent from the evidence that her left hip was by then also causing some problems.
4. By a report received on 22 February 2001 the Claimant's GP stated the Claimant's main disabling conditions as angina and osteoarthritis of the hips, the right being worse than the left. He stated that the Claimant could usually walk about 200 yards before the onset of angina or severe dyspnoea, and that the angina condition was "stable." In answer to a separate question as to the extent of the Claimant's normal walking ability before the onset of severe discomfort he wrote: "100 metres (recent hip surgery)".
5. On that evidence a decision was made on 28 February 2001 that the Claimant was not entitled to any rate of either component of disability living allowance from 6 July 2001. The decision maker's reasons included the comments that "it is reasonable to conclude her walking will improve further with rehabilitation" and that her care needs should also reduce as she recovered from the effects of the surgery.
6. The Claimant is recorded as having said in a telephone conversation on 8 March 2001 that "she still suffers from breathlessness due to angina and she may have to have her other hip done soon so needs the same level of care and mobility." On the form appealing against the decision of 28 February 2001 (signed on 3 April 2001) the Claimant stated that the hip operation had eased the pain, "but I still need help and care day and night in all parts of my life to make it easier."
7. Also before the Tribunal was a letter from the Claimant's husband which is undated, but must have been written at about the beginning of May 2001. It stated that the Claimant was then in more pain than she had been before the operation, and that her GP was not happy about her condition and had referred her back to the specialist at the hospital.

8. The Claimant elected for a hearing on the papers, and on 10 May 2001 the Tribunal dismissed the appeal.
9. The Tribunal considered that on the evidence before it the Claimant would not on 6 July 2001 satisfy the conditions for any rate of either component. Save in the one respect which I mention below, its reasoning was in my judgment impeccable.
10. The fresh claim made on January 2001 was in my judgment rightly considered simply as a claim for renewal of the existing award as from its expiry date. There was in my judgment no sufficient evidence that by the date of the decision on 28 February 2001 the Claimant's condition had deteriorated since the making of the previous award, so as to warrant treating the fresh claim as an application for supersession of that award.
11. The one possible flaw in the Tribunal's reasoning was in my judgment that it did not indicate that it had taken into account the letter from the Claimant's husband which I referred to in para. 7 above, and did not consider whether, in the light of that letter, it ought to adjourn the hearing so that up to date medical evidence as to her condition could be obtained. In my judgment, if evidence as to changes in the Claimant's condition after the date of the decision appealed against (28 February 2001) was admissible, the Tribunal, given that it was seeking to ascertain her likely condition at the renewal date (6 July 2001), ought certainly to have considered whether further medical evidence was necessary. Had it considered that, I think that it would (or at any rate ought to) have concluded that further evidence was necessary. I do not think that it would have been right, in the particular circumstances of this case, simply to take the view that it was up to the Claimant to produce medical evidence. The Tribunal's reasoning was that her condition was likely to improve by 6 July, but the letter provided evidence which cast serious doubt on that, and the only way in which that doubt could have been satisfactorily resolved was by up to date medical evidence.
12. However, s.12(8)(b) of the Social Security Act 1998 prevents an appeal tribunal from taking into account circumstances not obtaining at the time when the decision appealed against was made. Does that prohibition apply where the appeal is against a decision on a renewal claim, and the circumstances sought to be taken into account occurred between the date of the decision appealed against and the renewal date? In my judgment it does not.
13. The following provisions are directly material.

Social Security Act 1998

- s.8(2): "Where at any time a claim for a relevant benefit is decided by the Secretary of State –
- (a) the claim shall not be regarded as subsisting after that time; and
 - (b) accordingly, the claimant shall not (without making a further claim) be entitled to the benefit on the basis of circumstances not obtaining at that time.

- s.12(8): "In deciding an appeal under this section, an appeal tribunal –

- (a) need not consider any issue that is not raised by the appeal; and
- (b) shall not take into account any circumstances not obtaining at the time when the decision appealed against was made.”

The Social Security (Claims and Payments) Regulations 1987

Reg. 13C: “(1) A person entitled to an award of disability living allowance may make a further claim for disability living allowance during the period of 6 months immediately before the existing award expires.

(2) Where a person makes a claim in accordance with paragraph (1) the Secretary of State may –

- (a) treat the claim as if made on the first day after the expiry of the existing award (“the renewal date”); and
- (b) award benefit accordingly, subject to the condition that the person satisfies the requirements for entitlement on the renewal date

(3) A decision pursuant to paragraph 2(b) to award benefit may be revised under section 9 of the Social Security Act 1998 if the requirements for entitlement are found not to have been satisfied on the renewal date.”

14. In my judgment it is implicit in Reg. 13C of the 1987 Regulations that circumstances occurring between the date of a decision on a renewal claim and the renewal date can (and therefore must) be taken into account by an appeal tribunal. My reasons are these:

- (1) Where, under Reg. 13C(2)(a), the claim is treated as if made on the renewal date, what appears to have been the rationale behind s.12(8)(b) is removed.
 - (a) Reg. 13C(2)(a) is on the face of it a somewhat strange provision, as it appears to envisage a decision being made before the date on which the claim is treated as being made. The explanation for the introduction (by an amendment to the 1987 Regulations made in 1992) of that somewhat strange concept may have been the desire to avoid the effect of s.30(12) of the Social Security Administration Act 1992. That provided that, where a claim for a disability living allowance in respect of a person already awarded such an allowance was made or treated as made during the period for which he had been awarded such an allowance, it was required to be treated as an application for a review. But whatever the precise reason for s.13C(2)(a), its language is clear.
 - (b) S.12(8)(b) of the 1998 Act follows logically from s.8(2) of that Act. The old down to the date of hearing rule for appeal tribunals, as analysed by the tribunal of Commissioners in R(S) 2/98, was based on the continued existence of the claim. If the claim does not continue to exist after a decision on it, the basis for the down to the date of hearing rule is undermined: see R(DLA) 3/01 at paras. 20 to 24.

- (c) However, where on a renewal claim the claim is not treated as made until the renewal date, s.8(2) cannot apply – the claim is expressly treated as subsisting after the date of the decision on it. S.12(8)(b) is therefore inappropriate.
- (2) Reg. 13C(2), having stated that the Secretary of State may treat the claim as if made on the renewal date, goes on to provide that he may “award benefit accordingly.” That means that the task of a decision maker (and appeal tribunal on appeal) is to determine whether the conditions for disability living allowance will be (or were) satisfied on the renewal date. It is in my view implicit that circumstances which occur between the date of the decision maker’s decision and the renewal date can be taken into account by an appeal tribunal. It cannot have been the intention of s.12(8)(b) and Reg 13C, read together, that an appeal tribunal is prevented from taking into account changes in circumstances relevant to the very issue which it has to decide. If it were to ignore such changes, the effect of its decision would not be to “award benefit accordingly” (i.e. on the basis of a claim treated as made on the renewal date).
- (3) Reg. 13C(2)(b) provides that any award by the Secretary of State on a renewal claim is “subject to the condition that the person satisfies the requirements for entitlement on the renewal date”. It is in my judgment implicit in that provision that if it is apparent to an appeal tribunal that, owing to an improvement in the claimant’s condition after the date of a decision maker’s decision awarding benefit on a renewal claim, the claimant will not (or did not) at the renewal date satisfy the entitlement conditions, the tribunal should, notwithstanding s.12(8)(b), disallow the renewal claim. S.12(8)(b) does not oblige the tribunal to uphold the award and leave it to the Secretary of State then to seek to overcome the technical difficulties which he would appear to face on a subsequent attempt to revise or supersede the tribunal’s decision. If that is correct, the appeal tribunal must equally be entitled to take account of deterioration in the Claimant’s condition after the date of the decision appealed against.
- (4) It may be objected that s.12(8)(b) was enacted after Reg.13C, and is in unqualified terms. However, my task is to determine the meaning of the provisions as a whole, which I have sought to do above. I draw some comfort from the fact that there is at least one other apparently unqualified provision of the current adjudication legislation to which Reg. 13C provides an exception (although I accept more clearly so). Reg. 13(9) of the Social Security and Child Support (Decisions and Appeals) Regulations 1999 provides in unqualified terms that a decision by the Secretary of State cannot be revised by reason of a change of circumstances which occurred after the decision was made. Yet Reg. 13C(3) expressly provides to the contrary in the case of a renewal claim.
15. The Secretary of State has supported the appeal on the ground that the Tribunal did not make adequate findings as to the Claimant’s likely condition on 6 July 2001. His representative has submitted (in response to a Direction which I made raising the issue) that “there is no conflict between [s.12(8)(b) and Reg. 13C] and that the Tribunal were entitled to reach a decision in respect of the

claimant's renewal claim, i.e. from 6 July 2001." Although that is not as clear as it might have been, my understanding is that the construction which I have reached is supported.

16. The Secretary of State informs me that the Claimant has not made a further claim since the Tribunal's decision. In view of some comments which I made in my Direction, I should draw the Claimant's attention to the fact that it may be particularly important to do so before 5 July 2002 at the latest, in view of the provisions of paragraphs 3 and 5 of Schedule 1 to the Social Security (Disability Living Allowance) Regulations 1991, relating to further claims by a person over 65 made within 12 months of the expiry of a previous award. The Claimant may wish to seek advice as to her position in the light of these complex provisions.
17. The new tribunal must have regard to para. 14 above. The Claimant must consider what further medical evidence to obtain for consideration by the new tribunal at the rehearing.

(Signed)

Charles Turnbull
(Commissioner)

(Date)

30 January 2002