

INTERIM DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. The claimant's appeal to the Commissioner is allowed. The decision of the Durham appeal tribunal dated 3 July 2001 is erroneous in point of law, for the reason given below, and I set it aside in this interim decision. The claimant's appeal against the adjudication officer's decision dated 23 January 1999 is to be determined by a Commissioner after a further opportunity for an oral hearing (Social Security Act 1998, section 14(8)(a)). That decision will be given in the final decision in this case.

2. This appeal was not supported by the representative of the Secretary of State in the most recent submission, dated 12 August 2002. In an earlier submission, the Secretary of State had submitted that, if the Commissioner set aside the decision of the appeal tribunal of 3 July 2001, a decision to the same effect should be substituted on the papers. The claimant's representative has also submitted that I should substitute a decision, but to the effect that the decision awarding the claimant the higher rate of the mobility component of disability living allowance should not be reviewed and revised. He also requested an oral hearing. I have decided on the papers that there was an error of law in the decision of the appeal tribunal of 3 July 2001, so that no oral hearing is necessary for that purpose. I have also concluded that, in view of the many practical difficulties which might arise if the case were referred back to another appeal tribunal for determination, a Commissioner should make the decision on the claimant's appeal against the decision of 23 January 1999. However, that decision should not be made without having given the claimant and/or his representative the opportunity to attend an oral hearing. Accordingly, my present decision, setting aside the decision of the appeal tribunal of 3 July 2001, is an interim one. The final decision will be the decision on the appeal against the decision of 23 January 2001. I give directions about the oral hearing in paragraphs 14 to 17 below.

3. The appeal tribunal was concerned with an adjudication officer's decision dated 27 April 1998. That decision reviewed the decision awarding the claimant the higher rate of the mobility component from 27 April 1995 for life. The ground of review was relevant change of circumstances, in that there had been a reduction in the claimant's needs. The revised decision was that the claimant was not entitled to disability living allowance from and including 6 June 1997. The decision was maintained on second-tier review on 23 January 1999. There was a later adjudication officer's decision, dated 2 February 1999, finding the resulting overpayment not recoverable under section 71 of the Social Security Administration Act 1992. There appears, unsurprisingly, to have been no appeal against that decision, only against the decision of 23 January 1999.

4. The appeal tribunal of 3 July 2001 found that there should be a revision on review, but only from 28 January 1998, and confirmed that the resulting overpayment was not recoverable (although that does not seem to have been in issue). I do not need to go into the evidence before the appeal tribunal or into the merits of its evaluation of that evidence. For present purposes, the important point is that the appeal tribunal did not allow a person who I shall call Mr B to

represent the claimant at the hearing on 3 July 2001. The appeal tribunal had been informed that the claimant had not attended and therefore went ahead with the hearing in the absence of the claimant or a representative.

5. The chairman recorded the following in the record of proceedings:

"The appellant does not attend. [Mr B] attended the venue with [Mr W], his notetaker. He produced a letter of authority from the appellant appointing him his representative. The tribunal refused to admit [Mr B], as he has been notified by the Regional Chairman of tAS that he is excluded as a representative before tribunals until further notice, because of his behaviour before a previous tribunal. That letter was dated 14.10.00 and was addressed to [Mr B] at the same address as the appellant."

The statement of reasons for decision records in addition to the above that the appeal tribunal directed its clerk to advise Mr B that he would not be admitted because of the directions of the Regional Chairman and that Mr B and Mr W left shortly afterwards. The chairman had on 3 May 2001, when giving directions for the re-listing of the appeal (after a decision made on 6 October 2000 had been set aside), directed that Mr B was not to be asked to attend as the Regional Chairman had banned him as a representative until further notice.

6. The Regional Chairman has, in a very full and helpful response to a direction of mine, supplied a copy of his letter to Mr B dated 14 November 2000. The letter had the heading "withdrawal of representative status". The first two paragraphs were as follows:

"It has been brought to my attention that at hearings of [the claimant's] appeal to the Appeal Tribunal, as well as being his friend, you purported to act as his representative. I wrote to you about the postponement and four adjournments in this case on 28 July 2000. I have read the appeal papers and consulted with the Chairman of the oral hearing on 6 October 2000. I am satisfied that your conduct of this appeal has not been conducive to a prompt, efficient and just disposal of the appeal.

I have therefore instructed the staff of the Newcastle office that you are not to be accorded the courtesies we normally extend to representatives. This means that any communication with the office will have to be by your clients. Any mail received from you on behalf of clients will be returned to your clients with an explanation that you are not recognised by the Appeals Service as a representative in respect of any administrative matters connected with their appeals."

The letter went on to give the reasons for the Regional Chairman's directions (which I think that I should not explore) and to say that the ban had an immediate effect. It was also stated that Mr B could make a reasoned response at any time, subject to the outcome of some other investigations.

7. The claimant now appeals from the decision of the appeal tribunal of 3 July 2001 with my leave. In that appeal Mr B has been acting as his authorised representative. When granting

leave to appeal I said the following:

"This case has come before me when arrangements were about to be made to list the previously directed oral hearing of the application in Doncaster. On examination of the papers it appears to me that there is a clearly arguable point of law on which leave to appeal should be granted. The hearing is therefore unnecessary. I have considered whether the date provisionally set aside in Doncaster for the hearing of the application should be used for a hearing of the appeal. However, I consider that there should be a written submission from the Secretary of State before it is decided how the appeal should proceed.

The point of law is this. It is arguable that a Regional Chairman has no power within the Social Security and Child Support (Decisions and Appeals) Regulations 1999 to give a general direction or make a general ruling that a person is not to be admitted to hearings as a representative because of his past conduct. Regulation 38(2), giving a legally qualified panel member power to give such directions as he may consider desirable for the just, effective and efficient conduct of proceedings, appears to relate to particular proceedings and not to give a general power.

It is for the chairman of an appeal tribunal to determine the procedure in an oral hearing (regulation 49(1)), but that is subject to the right under regulation 49(8) of a claimant to be represented by any person and to the requirements of the principles of natural justice. A chairman might have power under regulation 49(1) to exclude a particular person as a representative or to allow the person to act only on giving an undertaking of good behaviour. However, that would have to be based on an individual judgment on the circumstances of the case. In the present case, the appeal tribunal and its chairman appear to have acted by implementing the Regional Chairman's direction, without exercising any individual judgment.

It is arguable that there was an error of law in excluding the claimant's representative and in proceeding to hear the appeal in the absence of the representative and the claimant."

8. The representative of the Secretary of State, after the copy of the Regional Chairman's letter of 14 November 2000 was produced, has submitted that there was no error of law in the chairman of the appeal tribunal of 3 July 2001 refusing to admit Mr B as the claimant's representative on the basis of the Regional Chairman's previous ruling in the particular proceedings. The claimant's representative disagreed and put in detailed submissions in his reply dated 17 September 2002. I do not need to go into most of the matters raised there, as I reject the submission on behalf of the Secretary of State. I prefer the careful and limited analysis of the law and the circumstances given by the Regional Chairman in his letter dated 3 May 2002.

9. In that letter the Regional Chairman accepted the position as set out in the third paragraph of what I said when granting leave to appeal. As he put it, he had the statutory powers of a legally qualified panel member, but by virtue of his appointment as Regional Chairman had

general duties and functions, rather than additional judicial powers, including the giving of general advice to clerks on how to proceed when requested to do so. He pointed out that his letter of 14 November 2000, in addition to giving such advice about other cases in which Mr B was involved, constituted specific directions in the case of the present claimant. There can be no doubt that that was so and that the direction was given under the power in regulation 38(2) of the Decisions and Appeals Regulations. The Regional Chairman then submitted that his letter of 14 November 2000 (together with a memorandum bringing it to the attention of the Appeals Service administration and of the chairman of the appeal tribunal of 6 October 2000) only contained directions limited to withdrawing administrative cooperation from Mr B. This was to ensure that any future correspondence in the claimant's case would arise with his knowledge and on his instructions. The letter of 3 May 2002 continued:

"No direction was ever given to Panel Members, specific or otherwise in relation to hearings. Though the factual account in the memorandum and letter might serve as a basis for further tribunal directions, the procedure at hearings would be a matter for directions under regulation 49(1).

The chairman's direction of 3 May 2001 only goes as far as instructing the clerk not to invite the representative to attend.

The Statement of Reasons for the Appeal Tribunal's decision of 3 July 2001, paragraph 4, sentence 2 [saying that Mr B had been excluded as a representative appearing before appeal tribunals, on the directions of the Regional Chairman] is therefore incorrect. The directions in the letter and memorandum issued by me did not deal with the exclusion of the representative appearing before an Appeal Tribunal."

10. I accept and adopt that analysis. The inevitable result is that the decision of appeal tribunal was erroneous in point of law because of a breach of regulation 49(8) of the Decisions and Appeals Regulations. The right given by that regulation for a claimant to be accompanied and represented by another person at an oral hearing is unqualified. It must be given effect subject to any directions properly made by a legally qualified panel member under regulation 38(2) or to any rulings or determinations properly made by a chairman under regulation 49(1). Here, no direction was given by the Regional Chairman, exercising power as a legally qualified panel member under regulation 38(2), excluding Mr B from acting as the claimant's representative at an oral hearing of his appeal. The direction given by the chairman of the appeal tribunal of 3 July 2001 on 3 May 2001, also in exercise of the power in regulation 38(2), did not extend that far either. It merely directed that Mr B was not to be asked to attend the hearing. If the direction had purported to exclude Mr B from acting as the claimant's representative at the hearing, it would have been undermined by the same reasoning as applied below to the chairman's actions on 3 July 2001.

11. The chairman on 3 July 2001 did exclude Mr B from acting as the claimant's representative at the hearing, despite clear evidence of his authorisation. That was a determination which he had power to make under regulation 49(1) of the Decisions and Appeals Regulations only if it was made after proper judicial consideration. I do not think that it matters

that the determinations were described as being made by the appeal tribunal, rather than the chairman. Where such an important matter arises on the day of a hearing, a chairman will nearly always want to seek the views and advice of the other members of the appeal tribunal (if there are other members), and putting the determination in the name of the appeal tribunal does not detract from the chairman's powers. I do not want to say anything which could possibly be relied on to try to fetter the proper powers of a chairman under regulation 49(1). Nor do I want to enter into any discussion about how far a chairman is obliged to go by way of giving reasons for a determination under regulation 49(1) to exclude a representative. In the present case, the chairman's instinct (as one would expect) was to record some reasons and to include them in the statement of reasons for the overall decision. Those reasons reveal, as I suggested when granting leave, that the chairman did not give any independent consideration to the evidence as to Mr B's past conduct, but regarded himself as implementing a direction previously given by the Regional Chairman. No such direction had been given by the Regional Chairman or by any other legally qualified panel member. Therefore, the chairman on 3 July 2001 did not give proper judicial consideration to the basis on which he made the determination to exclude Mr B from representing the claimant.

12. There having been no legal basis for the exclusion of Mr B on 3 July 2001, the claimant was deprived of the representation he was entitled to have under regulation 49(8) of the Decisions and Appeals Regulations. A decision given by an appeal tribunal following a hearing which involved a breach of regulation 49(8) (leaving aside trivial cases) must be set aside as erroneous in point of law. I therefore set aside the decision of 3 July 2001.

13. The claimant's appeal against the decision of 23 January 1999 remains outstanding. As recorded in paragraph 2 above, that appeal is to be determined by a Commissioner, so that a decision can be given under section 14(8)(a) of the Social Security Act 1998.

14. I now direct that there is to be an oral hearing of that appeal. The case appears suitable for listing in Doncaster, preferably to be heard by me, and is not suitable for the video-linking trials. I hope that the claimant will be able to attend to give evidence in person.

15. If the claimant or his representative wishes to rely on any documentary evidence not currently in the Commissioner's file, copies should be provided to the Commissioners' office as soon as possible, and no later than 14 days before the date fixed for the oral hearing.

16. As soon as possible, and no later than 14 days before the date fixed for the oral hearing, a representative of the Secretary of State is to give notice to the Commissioners' office and to the claimant and his representative of any witnesses it is intended to call at the hearing to give evidence in person and of any intention to present video evidence. At the same time a copy of any new documentary evidence is to be provided. The Secretary of State may take the opportunity to put forward a fresh written submission, identifying the evidence relied on on behalf of the Secretary of State and setting out, with supporting reasoning, the decision which it is said that the Commissioner should make. If no witnesses are to be called by the Secretary of State, early and, if necessary, separate notice of that would be helpful in estimating the time to be allocated to the oral hearing.

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17. Any documentary evidence produced after the date mentioned above will only be taken into account if there is a reasonable explanation for its not being produced earlier.

**(Signed) J Mesher
Commissioner**

Date: 5 November 2002