13.11ch. 182

Commissioner's file: CDLA 4127 2003

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1 I allow the appeal. I set aside the decision of the tribunal. The appeal is referred to a new tribunal for rehearing.

2 The claimant and appellant is appealing with my permission against the decision of the Telford appeal tribunal on 23 July 2003 under reference U 04 051 2003 00285.

DIRECTIONS FOR REHEARING

3 A The rehearing will be by way of oral hearing.

B The tribunal is to consist of members who were not members of any previous tribunal involved in this appeal.

C The claimant and solicitors should consider whether they wish to submit any further medical evidence (for example, a further report form the general practitioner) to the tribunal. The Secretary of State should also consider if he wishes to submit any further evidence. Subject to a subsequent direction of a district chairman, any further evidence should be submitted within one month of this direction.

REASONS FOR THIS DECISION

The claim

4 The claimant, Miss A, claimed disability living allowance from and including 3 December 2002. She claimed severe problems walking and care needs both day and night because of spinal and other problems.

The examining medical practitioner report

5 An examining medical practitioner, Dr Lisk, examined Miss A on 11 January 2003. The standard report (DLA140) is supplemented by extensive typed notes. With regard to walking, Dr Lisk found that Miss A had low back pain, but no loss of limb function. In the doctor's opinion "she walks at about 30 metres per minute for 8-10 minutes at a time thus 250 metres before she stops". This is in similar terms to Miss A's own comments. These are recorded as: "I have chronic low back pain and I walk out of doors with 2 crutches. I can go for about 10 minutes and then I need to stop to rest." Her gait was described as: "Uses one or 2 crutches most of the time. Held her right hand over her buttock as she walks. Rather hystrionic ." Her balance while walking was described as "Adequate ~~with a crutch~~." The strikeout was made on 24 January. Under duration of mobility needs, the doctor commented that before 2002 she could "walk further with less pain". The use of crutches is noted at other places in the report. None was altered on 24 January. The alterations left the medical report internally inconsistent.

6 Dr Lisk found no problems that gave rise to care needs save with cooking. Miss A had told the doctor: "I can make tea and coffee. I can cut a sandwich. I cant stand to cook." Dr Lisk recorded that Miss A could peel and chop vegetables, use taps and use a

cooker, but could not cope with hot pans because "needs her crutches to be safe as she walks". This was "corrected" on 24 January to remove that limitation. In the typed notes, Dr Lisk wrote:

"Within the house in which she lives she brings up her little 5 year old girl, although she does have help taking the child to school and also with some meal preparation as she can only use the kitchen safely whilst holding onto her crutches. Thus she could in theory sit down to peel and chop vegetables as her hands and arms work well enough and she could deal with the knobs, dials and switches of her stove but because her spinal pain radiates into her thighs and she feels unstable when she is up, she is safer holding onto crutches ~~and therefore would have difficulty in emptying or draining off hot liquids from saucepans, etc.~~ *over long distances.*"

The text was struck out and replaced by the words in italics on 24 January.

7 The explanation for the alterations is that on 22 January 2003 Dr Somaratne of SEMA Medical Services wrote to Dr Lisk in the following terms:

"Please accept my apologies for returning this document, however it would greatly assist the Decision Maker dealing with this claim if the following points were addressed: [it continues in handwriting]

Customer has back pain. She has full function of limbs and no neurological deficit. You saw her walk without aids and also indicate that there is a sizeable anxiety component and exaggerated responses. She can walk 250 metres, climb stairs and bend to dress. There is no medical condition diagnosed to cause dizziness, imbalance or blackouts.

Given the clinical and pen picture it is very hard to understand why you have accepted that she needs to use crutches, thereby necessitating help with use of saucepans.

(1) main meal. It appears she can walk well without crutches. There is no medical or physical reason apparent why she needs crutches. It is felt that she should be able to cope without crutches for the time it takes to drain a saucepan into a colander. She is after all said to be safe with the oven. Could you please consider and confirm that she doesn't always need crutches and so should be able to perform the task?

Could you please sign and date against all amendments deletions and new notes you make to clarify."

8 I note that Dr Somaratne relied on Dr Lisk's findings of full function of limbs and no neurological deficit. This is one of too many reports from examining medical practitioners I have seen that find no limitation on limb function yet also record pain in the limbs – in this case in both upper and lower limbs - elsewhere in the report. I commented on this in CDLA 611 2003. As the Secretary of State accepted in that case, pain is a limitation to limb function. Did Miss A have full limb function when that term is properly understood? Looking at the report as a whole, Dr Lisk records that she did not. Dr Somaratne's factual assumptions are open to question. But Dr. Lisk made the alterations indicated.

The other evidence

9 There is a report from Miss A's general practitioner, Dr Qureshi, dated 8 July 2003. This confirms that Miss has spinal and other problems, and has trouble preparing a cooked main meal because of pains in right shoulder and spinal problems. It details

other daytime and nighttime care needs. With regard to walking, the general practitioner comments that she can walk 100 yards in 10 minutes using a walking stick and with stops due to pains. This report is not signed, as the tribunal noted.

10 The claimant gave evidence to the tribunal, recorded by the tribunal at some length. It is clear from this that Miss A's condition had in her own view deteriorated from January to July, and in particular she now had pains in her hands and arms that were not there before. Pains in the shoulder and back were, however, present for some time.

The tribunal's decision

11 The tribunal confirmed the decision of the Secretary of State. The hearing was in July 2003 but the tribunal rightly looked at the position the previous January. It found that things had become worse in the last 5-6 months, and that the doctors "now believed that she had spondylosis". (The claimant reported this in her claim form). She stopped using crutches because of pains under her arms. It recorded Miss A as being unable to estimate how far she could walk that January. It made no findings of fact about Miss A's ability to prepare a cooked main meal. It made no reference to her claim form, or the substance of the report of Dr. Qureshi. It failed to comment on the altered medical evidence, accepting the alterations without question. It concluded that there had been a significant deterioration in Miss A's condition since January but that, as at January:

"she greatly exaggerates her symptoms. We prefer the objective assessment of Dr Lisk both as to her ability to walk and as to her care needs. His judgment is based on clinical examination and observation. We have no medical evidence that at the time of the decision she was suffering from arthritis in the hands and arms. We are satisfied that she has failed to prove that she is virtually unable to walk in terms of distance speed gait and manner of walking. The only day needs she stressed were in respect of bathing. We are satisfied that she can safely self care."

Grounds of appeal

12 The grounds of appeal challenged the tribunal's findings of fact. The reason I granted permission to appeal related to two other aspects of the case: the way in which the tribunal relied on the examining medical practitioner report, and its inadequacy in making its own findings aside from that report. The grounds of appeal are one aspect of the latter point.

13 I deal with inadequacy first. The tribunal decision is set aside on that ground separately from any issue about the official evidence. There is evidence from both the claimant and the general practitioner that required the tribunal to consider the "cooking test" separately from any other aspect of care. It had conflicting evidence on this point both within the examining medical practitioner report and aside from it. But it made no express findings on it. There are also other inadequacies, but I need not catalogue them.

14 Turning to the broader issue, I quoted above the tribunal's wording - one might use the term incantation - about an "objective" medical report "based on clinical examination and observation". This echoes in part the standardised submission to the tribunal in the papers that:

"the visiting doctor's opinion is an independent and expert assessment, *based on the claimant's own statement* as well as the clinical findings and observations of someone practiced in making such assessments and as such accurately reflects her usual walking ability and care needs."

I added italics to emphasise that the examining medical practitioner is asked to base the report on
the claimant's history as well as examination.

15 The Secretary of State, or SEMA on the Secretary of State's behalf, did not take the view suggested in the submission. Far from it - Dr Somaratne specifically asked Dr Lisk to change the report in a particular way, and Dr Lisk did so. It is difficult to regard a report changed in this way as either "independent" or "objective".

Altering an official medical report

16 There are broader problems with the Department's medical evidence and with the way the tribunal failed to appraise it critically. As Lady Hale reminded us very recently in the leading judgment in *Kerr v Department for Social Development (Northern Ireland)* in the House of Lords [2004] UKHL 23, paragraph 14: "the position of the department is not to be regarded as adverse to that of the claimant". But in this case a SEMA doctor, who said that he was acting for the Decision Maker (or Secretary of State, or department) expressly invited the examining medical practitioner to change his report in a specific way to remove evidence and opinions supporting the claimant's claim, and the report was altered in that way.

17 The Secretary of State is entitled to arrange for and rely on whatever medical evidence Parliament authorises and he thinks fit. But a tribunal must be fair as between the Secretary of State and the claimant. In particular, the tribunal must ensure an "equality of arms". It should be alert about circumstances when the Secretary of State can seek clarification of an "independent" report when a claimant cannot take the same action. In particular, it should remember that the Secretary of State has had a chance in a case like this to get the report altered before the claimant even sees it. The only chance that the claimant has to get a similar change made is at the tribunal hearing, or by direction of the tribunal. As Lady Hale again reminded us about tribunals in *Kerr*, "the process is inquisitorial, not adversarial". That, as the decision in *Kerr* emphasises, means inquisitorial in a case like this of the Department and the examining medical practitioner as much as of the claimant and the general practitioner.

18 Far from the neutral approach noted by Lady Hale, the Secretary of State appears on the face of these papers to be behind an attempt to change the medical evidence against the interests of the claimant. I raised this issue directly with the Secretary of State's representative in a series of questions. I was offered answers to those questions from Dr Roger Thomas, Disability Living Allowance Medical Policy Manager of the Corporate Medical Group of the Department. Dr Thomas is or was the medical secretary to the Disability Living Allowance Advisory Board. The questions and answers on this point are:

"Does the Secretary of State consider that the actions taken in this case in and following the letter of 22.1. 03 were correctly taken in so far as they were taken to "greatly assist the Decision Maker"? Does the Secretary of State consider that it is

appropriate in this context for another person to suggest not only that the examining medical practitioner reconsider her or his report but also how he or she should do that?"

Dr Thomas' reply is:

"The Letter dated 22/01/03

This letter is on a standard form used by Medical Service where clarification is needed. The contract [with the Department] does not specify that this form should be used for "rework" cases. The rework process was correctly applied.

The decision-maker required clarification of the report as she considered that there were inconsistencies. The "rework" was correctly applied in order to assist the decision-maker's understanding of the doctor's opinion.

The rework process serves a number of purposes:

- It clarifies the report for the decision-maker
- May identify a training need for the examining medical practitioner
- Enables the full time doctor to give feedback to the examining medical practitioner

In this case I consider it appropriate for the full time doctor to point out the inadequacies/contradictions in the report. However he has gone too far in suggesting how the report should be amended."

19 It is standard procedure for tribunals to rely on SEMA (now Atos Origin, following its acquisition of the Department's contract from SchlumbergerSema) medical reports without the doctors who make them being called as witnesses or being subject to any other form of questioning by claimants or tribunals. Expert views such as this - and certainly changed expert views with which one party disagrees - could in other courts and tribunals expose the expert to a summons to give evidence under cross-examination on exactly what his or her findings and opinion were. Appeal tribunals have that power, and perhaps they should use it where necessary to ensure fairness. But this is not the most effective or efficient way of handling most challenged medical reports, not least because the tribunals have medical members. One obvious answer is to use that medical expertise and for the tribunal to make its own findings rather than to rely on inconsistent or doubtful official evidence. Another is to seek further evidence either from the Department and the doctors that advise it or from elsewhere, such as the specialist referred to in this case. Another response more robust tribunals use is to ignore a compromised examining medical practitioner report entirely and look only at the other evidence. Whatever approach it takes, the tribunal must be not only efficient and effective but also fair. In cases like this it must, in Article 6 terms, equalise the arms.

20 This tribunal failed to notice another problem. It noted that the general practitioner did not sign his report, but paid no attention to the signature on the examining medical practitioner report. At the end of every DLA140 is a declaration. The examining medical practitioner declares that "to the best of my knowledge and belief the information given following my examination is correct". This was signed by Dr Lisk on 11 January 2003. It was not re-signed or in any way corrected on 24 January 2003. I have seen several cases in which examining medical practitioners and approved doctors have altered reports at the request of others after the declaration has been signed, and others altered by third parties. In none have I seen any amendment or addition to the formal declaration at the end of the report. That must call the evidential value of the alterations, and perhaps the entire report, into question. The Secretary of State, claimants and tribunals are all entitled to rely on declarations meaning what they say. Actions like those in this case make a mockery of such declarations, and undermine the reliability of the documents to which

they are attached. To put it at its simplest, we are told by a professional doctor that on the date of the examination and signature the report is prepared "to the best of my knowledge and belief". We are then told that the doctor was wrong in so declaring, but not to anyone's best knowledge or belief. What is to be believed?

My decision

21 I am glad to record the authoritative view on behalf of the Secretary of State that the letter of 22 January 2003 went "too far". I agree. I am much less happy to see that the secretary of state's representative nonetheless saw no reason to question the tribunal's reliance on Dr Lisk's report. I reject the secretary of state's representative's submission on this issue. It misses the point. This case had originally become entangled with the *Gillies* case, decided by the Court of Session on 28 November 2003, in which the independence of a member of the tribunal was questioned because she was also an examining medical practitioner. I agree with the secretary of state's representative that nothing arises in this case on that point. The point is that Dr Somaratne, purportedly acting in the name of the Secretary of State, secured alterations to the medical evidence in an unacceptable manner and in circumstances where no change could be sought by a claimant.

22 That should have put the tribunal on alert. It did not. On the contrary, the tribunal seems to have followed Dr Somaratne's lead. It failed to ask questions, even rhetorically, of anyone other than the claimant. It questioned the signature of the general practitioner to his medical report but not that of the examining medical practitioner to his medical report. It commented on deficiencies in the general practitioner report but not on deficiencies in, and alterations of, the examining medical practitioner report. It relied on the examining medical practitioner report as "objective" when it was plainly not objective. It dismissed the general practitioner report without weighing its evidential value at all. In summary, it used its inquisitorial power selectively and in an unbalanced way to the detriment of the claimant. The decision must be set aside for that reason also.

23 The new tribunal must look at the whole matter afresh. It should ignore the record of decision of this tribunal. It should question any alteration to the medical report of Dr Lisk not covered by the declaration at the end of it. It should consider if it needs further evidence from Dr Lisk or others. Above all, it should use its own expert independent judgment and make its own findings on the questions in dispute.

24 I direct that copies of this decision be sent to the chairman of the tribunal and to both the doctors named in it.

David Williams
Commissioner
10 May 2004

[Signed on the original on the date shown]