

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. This is an appeal by the claimant, with my permission, against a decision of the appeal tribunal sitting at Reading ("the appeal tribunal") on 19th February 2002. For the reasons which I give, that decision is erroneous in point of law. I therefore allow the appeal and set aside the decision of the appeal tribunal.

2. In exercise of the powers conferred upon me by section 14(8)(a) of the Social Security Act 1998, I give the decision which I consider the appeal tribunal should have given.

3. My decision is that the claimant is entitled to an award of the higher rate of the mobility component and the highest rate of the care component of a disability living allowance for the period from 31st August 2001 to 30th August 2004.

4. This appeal involves a claim to a disability living allowance. The claimant, a married woman who was born on 30th April 1950, has the misfortune to suffer from a number of debilitating medical conditions. These require her to take an extensive range of medicines and to attend various doctors on a regular basis. For present purposes, it is important to note three matters. First, that this appeal is concerned with a renewal claim. Secondly, that the award which the claimant seeks to renew is an award of the higher rate of the mobility component and the highest rate of the care component. Thirdly, that that award was for the period from 31st August 1999 to 30th August 2001, inclusive of both dates. It therefore continued until 30th August 2001.

5. In March 2001, the claimant applied to renew that award so that it would continue after 30th August 2001. This time she was not so successful. On 21st May 2001, a decision maker gave the decision which gives rise to this appeal. He decided that the claimant was not entitled to either rate of the mobility component from and including 31st August 2001. He further decided that she was entitled to the lowest rate of the care component, on the grounds that she could not prepare and cook a main meal herself, for the period from and including 31st August 2001. That was an indefinite award. A copy of the decision will be found at pages 106 to 110 of

the papers. Again, it is important to note certain matters. First, the date of the decision was 21st May 2001. Secondly, the decision did not attempt to interfere with the claimant's existing award. Consequently, she continued to receive the higher rate of the mobility component and the highest rate of the care component up to and including 30th August 2001. Thereafter her entitlement reduced to the lowest rate of the care component. The decision of 21st May 2001, was reconsidered on 4th September 2001, but was not revised. See page 111 of the papers.

6. The claimant was dissatisfied and appealed. According to page 134 of the papers, the "appeal was adjourned on 30/10/2001 for further medical evidence to support the appeal". The claimant was examined by an examining medical practitioner on 6th December 2001. The resulting report will be found at pages 137 to 162. It is extremely supportive of the appeal. Putting it simply, on the basis of the evidence contained in the report, the claimant was clearly entitled to the higher rate of the mobility component and the highest rate of the care component. However, the report contains one, highly curious, feature. The report is in the form of a questionnaire to which the examining medical practitioner is required to record or to give answers. One question, which is asked in several different places, is for how long have any recorded care needs existed? In this case the answer recorded is always "June 2001". For example, on page 143 of the papers, in a section recording answers given by the claimant, the question was asked "How long have these needs existed?" the claimant is recorded as telling the doctor "Since June 2001". On page 152, the doctor was asked "Duration of Mobility needs" and replied "06/01". He gave a similar answer to a general question asked on page 162.

7. Pausing there, it is perfectly clear that the claimant's needs and the problems resulting from her disabilities must have arisen long before June 2001. There are several reasons. The two most important are as follows. First, she had been in receipt of the higher rate of the mobility component and the highest rate of the care component since August 1999, and that entitlement was still in being in June 2001, and continued until 30th August 2001. Secondly, it is clear from the examining medical practitioner's report that, by early December 2001, the claimant was a very sick woman. Given her past medical history and the award that existed in mid-2001, it was incredible that her condition had suddenly deteriorated between 21 May 2001, when it was first decided that her needs did not merit an award of more than the lowest rate of the care component, and sometime in June 2001, when

it was clear that she was entitled to the maximum award. Putting it another way, no sudden deterioration has been suggested and no fact has emerged that might explain one.

8. This was an aspect which required careful investigation by the appeal tribunal. The suggestion that the claimant's care needs had arisen in June 2001, appears to have been derived from an answer which she herself gave. It seems probable that the examining medical practitioner then merely repeated that answer at various points in his report. I have no doubt that, if the appeal tribunal had been able to question the doctor, a sensible explanation would have emerged. Unfortunately it is in the nature of these appeals that the examining medical practitioner is very rarely, if ever, available to answer questions. Further, the claimant herself was not present. She had elected for a paper hearing. The appeal tribunal was concerned at her absence. Paragraph 2.2 of the statement records that enquiries were made as a consequence of which the appeal tribunal was informed that she was not well and would not attend the hearing. The appeal tribunal considered the situation and decided, in the circumstances, to proceed with the hearing in her absence.

9. The statement is a long document and much care has obviously gone into its preparation. The appeal tribunal decided that, by the time she was examined in early December 2001, the claimant's condition was such that she merited a much higher award than the lowest rate of the care component. In the final paragraph of its statement (paragraph 4.20) the appeal tribunal said that it was of the view that she should make a fresh claim for a disability living allowance in the light of the report dated 6th December 2001. However, the appeal tribunal dismissed her appeal although it left in being the indefinite award of the lowest rate of the care component from 31st August 2001. It dismissed her appeal for two reasons. First, it considered that the relevant legislation required it to consider matters at the date of the decision. This it took to be 21st May 2001. Secondly, influenced greatly by the answers in the examining medical practitioner's report, it decided that her needs were insufficient to merit a higher award at the date of decision (21st May 2001) although in the following month, for reasons that have not been identified, her condition deteriorated and her needs increased. There are frequent references to these points throughout the statement. The following gives a flavour of the rest.

“ 4.4 The Tribunal accepts the evidence that [the claimant] has extreme difficulty in walking and has considerable care needs in connection with her bodily functions both day and night.

4.5 However, the Tribunal notes that [the claimant] informed the doctor that these needs have arisen since June 2001. [The claimant] was seen by the visiting doctor with her husband. The Tribunal accepts this evidence and finds that [her] needs began in June 2001.”

10. Although the appeal tribunal referred near the beginning of its decision to the award that had been in existence in May 2001, it did not refer to it thereafter. The consequences of its decision are as follows. On 21st May 2001, the claimant was receiving both components at the highest possible rates and continued to do so until 30th August 2001. Her appeal seeking to continue that award after that date was dismissed because the appeal tribunal considered that she was only entitled to such an award from, say, the beginning of July 2001. This was nearly two months before 30th August, but was about five weeks after 21st May 2001. Put like that, the situation is nonsensical. It is a conclusion that, as a matter of commonsense and humanity, one would not wish to reach.

11. The Secretary of State's representative, Mr Steven Shaw, has, in his written submissions, drawn my attention to an escape route. In Decision CDLA/3848/01, Mr Commissioner Turnbull decided that, notwithstanding section 12(8)(b) of the Social Security Act 1998 – the so called “down to the date of decision rule” – where a tribunal is dealing with a disability living allowance renewal claim, it is required to take into account circumstances occurring between the date of the decision and the renewal date. See paragraph 14 of the Commissioner's decision and paragraph 4.3 of Mr Shaw's helpful submissions. The route by which Mr Commissioner Turnbull reached this conclusion is complicated and, since a copy of his decision is to be found with the papers, I shall not attempt to explain it. I merely say that I agree with his reasoning and am grateful for his conclusion.

12. It follows that the appeal tribunal erred in law. Since Mr Commissioner Turnbull's decision was only issued to the parties before him a fortnight or so before the appeal tribunal determined the claimant's appeal, there was no possibility of the members of the appeal tribunal being alerted to it. It is unlikely

to have entered the public domain in time. Nevertheless, it was declaratory of the law and did not change it. It is clear from the appeal tribunal's decision that, if it had been aware of the decision, it would have allowed the appeal and probably continued the award which was then in existence. That being so, I consider that I can give a final decision rather than remitting the matter for rehearing. I therefore give the decision which I do in paragraph 3 above. In paragraph 4.5 of his submissions on behalf of the Secretary of State, Mr Shaw has submitted that this is the appropriate decision for me to give. I am grateful to him for that submission. The decision dated 25th May 2001, awarded the claimant the lowest rate of the care component for an indefinite time. My decision replaces that award with a periodic one which will take matters up to and including 30th August 2004. I do so because the claimant is receiving attention or treatment and it is appropriate to reconsider matters after a period. See paragraph 4.5 of Mr Shaw's submissions. Accordingly, for these reasons I allow the appeal and give the final decision which appears in paragraph 3.

(Signed) J.P. Powell
Commissioner

Dated: 14th July 2003