SW → File

Bullets 169

File no: CDLA 4895 2001

DECISION OF THE SOCIAL SECURITY COMMISSIONER [Short]

1 I allow the appeal.

2 The appellant is appealing with my permission against the decision of the Stratford appeal tribunal on 11 July 2001 that the appellant was entitled to the higher rate of the mobility component from and including 25. 5. 2000 but not entitled to the care component of disability living allowance from and including 25. 5. 2000. I granted permission to appeal, the chairman having refused to do so on grounds that the appeal was late and that no special reasons were indicated. That refusal was challenged in the course of these proceedings, and I comment on it below.

3 For the reasons below, the decision of the tribunal is erroneous in law. I set it aside. I refer the appeal to a differently constituted tribunal to determine in accordance with the directions in this decision.

Was the request for leave to appeal in time?

4 When granting permission to appeal, I asked whether the application to the chairman for leave to appeal was late. As noted, the chairman had ruled that it was, but the solicitors acting for the appellant had challenged this strongly.

5 The decision of the tribunal was given on 11 July 2001. The statement was prepared later. The statement does not itself indicate when it was sent to the parties. The application for leave to appeal was submitted by a clerk to a chairman as a late appeal. It contained the information that the statement was issued on 12 September 2001 (there is no confirmation of that date on file and it is missing from the one place where it ought to be recorded), and that the application was received on 15 October 2001 (which is wrong). The chairman noted it as a late appeal and refused to consider the application, commenting:

> "the regulation requires an application to be within one month: regulation 58(1)(a). To be within the month the application must have been sent, at the latest, on 11.10.01. It was sent on 12. 10.01."

It can be seen from the papers that the application was sent by fax and stamped as faxed at 10:08 on 12/10/2001, presumably by the receiving machine.

6 Three points arise on this. First, what was the time limit to be applied? Since I granted permission to appeal, the point has been considered in full, along with other time limits, by Commissioner Turnbull in CIB 4791 2001. His conclusion is the same as that of the district chairman in this case. I raised the issue with reference to my own decision CIB 3937 2000 (which dealt with the time limit in regulation 54(3)). I respectfully agree with the analysis of regulation 58(1)(a) in CIB 4791 2001. The time limit under regulation 58(1)(a) is a day shorter than the time limit under regulation 54(3). That being so, the appellant's application was out of time. I also agree with the Commissioner's comments about inconsistent time limits.

7 The second point is the form in which notice is given. In this case it was given by fax and confirmed by post. Was the clerk right to ignore the fax and only note the arrival of the posted copy? That raises the issue whether fax is an appropriate

method of giving notice. The secretary of state's representative submitted that regulation 58:

> "does not specify by what method the application is to be made, it purely implies that it be in writing. Therefore the faxed application is sufficient...".

I agree. The Social Security and Child Support (Decisions and Appeals) Regulations 1999 makes no express reference to electronic methods of communication such as fax. In this case, the fax was received and I see no problem about it being properly regarded as adequate for the purposes of giving or sending an application for leave to appeal under regulation 58. It also has the advantage that the precise date and time of sending and arrival are both independently registered. The clerk was therefore wrong to tell the chairman that the notice was received only when the posted copy arrived. There may be problems if a fax does not arrive, or does not arrive in legible form, but those do not arise here as the fax was reproduced in documentary form on delivery.

8 The fax giving notice of the application for permission to appeal was both sent and received, for all practical purposes, at the same time, and we know what that time was. It was out of time under regulation 58(1)(a) by a few hours. The district chairman's ruling on that point was correct. The district chairman's refusal to admit the late application under regulation 58(5) was a matter for the discretion of that chairman, and I do not comment on it.

Special reasons for a late application?

9 The chairman has a discretion under regulation 58(5) of the Social Security and Child Support (Decisions and Appeals) Regulations 1999 to admit a late application for special reasons. That is unappealable. Notwithstanding that refusal, the Commissioner also has a discretion to admit for special reasons under regulation 9(3) of the Social Security Commissioners (Procedure) Regulations 1999. In this case, given the dispute about whether the application was late, I considered it appropriate to accept that special reasons existed if the application was late. That was specifically so as not to prejudge the challenge to the chairman's view that the application was late.

10 In CSDLA 71 1999 Commissioner May QC noted the general guidance given by courts and Commissioners about "special reasons", and in particular the guidance in R(M) 1/87. He then commented:

> "I do not consider that merely because an application is lodged only a short time after the expiry of the time-limit that of necessity amounts to special reasons. "

I agree. My own view is that now the issue of time limits has been cleared up by CIB 3937 2000 and CIB 4791 2001, and the availability of fax as a means of making an application is accepted, the need for professional representatives in particular to observe time limits strictly should be clear.

The substance of the appeal

11 The secretary of state's representative supported the appeal on entirely separate grounds, namely that the tribunal erred in its contention that the opinion of the examining medical practitioner was "in the absence of further evidence, the only objective assessment of the care needs". Both parties agree, and so do I, that the

tribunal erred because it ignored a previous tribunal's adjournment with directions for specific additional medical evidence to be produced and for an oral hearing or domiciliary visit. The tribunal whose decision is under appeal did not check what had happened following that direction before drawing a conclusion that appeared to assume there was no such evidence. I set aside the tribunal decision on that ground, and direct the appeal be reconsidered by a new tribunal. The parties should ensure that the additional evidence originally requested in April 2001, and any further relevant evidence, is sent to the new tribunal in good time before the hearing. The case should be relisted, as the previous tribunal directed in April 2001, for an oral hearing.

12 The appellant is advised that it is in his own interests to attend the new hearing if he possibly can. The appellant is entitled to the higher rate of the mobility component of disability living allowance. If he is still entitled, or can produce supporting medical evidence, he should also be entitled to the taxi fares to allow him to travel to and from the tribunal hearing by taxi. He should contact the tribunal clerk about this. If he is entirely unable to attend an oral hearing at the nearest tribunal, and he has medical evidence to support that, then he should, as the tribunal in April 2001 suggested, ask for a domiciliary hearing (that is, a hearing at or near his own home).

David Williams
Commissioner

29 April 2002

[Signed on the original on the date shown]