Bulletin 162 7
- cooking test
- oven not required
- can consider use of unconventional cooking methods.

SOCIAL SECURITY AND CHILD SUPPORT COMMISSIONERS

Commissioner's File No.: CDLA/5686/1999

Starred Decision No: 38/01

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38/01

CDLA/5686/1999

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. This is an appeal, brought by the claimant with the leave of the tribunal chairman, against a decision of the Harlow disability appeal tribunal dated 28 January 1999, whereby they held that the claimant was not entitled to the care component of disability living allowance from 18 March 1997. I held an oral hearing of the appeal at which the claimant was represented by Mr Desmond Rutledge of the Free Representation Unit and the Secretary of State for Social Security, who has succeeded to the functions of the adjudication officer, was represented by Ms Rachel Rayner of the Office of the Solicitor to the Departments of Social Security and Health.

2. The claimant suffers from back problems, following an injury at work in 1989, that led to a laminectomy in 1990, and an accident at home in 1995, that resulted in a fractured vertebra. At the time of the hearing before the tribunal he was aged 37. He had been in receipt of the higher rate of the mobility component of disability living allowance since 9 April 1992 and the tribunal did not disturb the current award, which was for life, although they did express doubts about it. He had been in receipt of the middle rate of the care component from 9 April 1992 to 23 July 1997. The present appeal arises out of a renewal application for review made on 5 February 1997 in anticipation of the expiry of the award of the care component. The claimant alleged that his condition had deteriorated since the previous award had been made. He said that he used two walking sticks and that he wore a corset. He claimed to require attention and supervision during the day and also some help at night. Of relevance to the present appeal are claims that he had fallen over and burned himself when he had tried to do things by himself and that he suffered from painful spasms in his spine which took the wind out of him and usually made him collapse in pain. He said he fell at least two or three times a day. He also said that he would need help in preparing a cooked main meal for himself, in so far as planning the meal, peeling and chopping vegetables, using cooking utensils, using a cooker and coping with hot pans were concerned. He added that, if he went into spasm, he would instantly drop anything he was carrying. On 17 March 1997, the claimant was examined by a medical practitioner who took the view that he would need help with hot pans but otherwise could prepare a main meal. He recorded that the claimant had fallen three days earlier and had sustained a laceration over his forehead and that the claimant was expecting soon to move to a bungalow.

3. In the light of the report, the adjudication officer decided that the claimant's care needs had not increased but had decreased and, on 3 April 1997, he or she reviewed the existing award of disability living allowance and decided that, in respect of the care component, the claimant was entitled only to the lowest rate of the care component from 17 March 1997. On 23 April 1997, by which time he had moved to a ground floor flat, the claimant applied for a review but, on 2 July 1997, another adjudication officer decided not to revise the decision of 3 April 1997. The claimant appealed. On 23 June 1998, the claimant did not appear and the tribunal adjourned to enable him to do so "as he is in danger of losing his present awards". On 12 August 1998, the tribunal decided not to interfere with the award of the mobility component but asked for a further medical report in respect of the care component. At least part

of the reason for that was that the previous examining medical practitioner had at one time been the claimant's general practitioner with whom the claimant had fallen out. This medical practitioner examined the claimant on 1 December 1998 and considered that the claimant not only needed help coping with hot pans but also with using a cooker. He said that the claimant could not use hot saucepans, could not bend down and could not use a kettle for fear of dropping it. He recorded that the claimant had last fallen in July, when he had missed a step.

4. The tribunal sat again on 28 January 1999 with a different constitution. In the full statement of the tribunal's decision, the chairman recorded findings of fact, explained why they had not dealt with the mobility component and then continued:

> "2. In relation to the care component the tribunal had to address the question as to whether the appellant satisfied the criteria for an award of middle or highest rate as appealed or that he satisfied the criteria for an award of the lowest rate as already awarded.
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> 3. The tribunal took into account the EMP's report of 17.3.97 and preferred this report as the clinical findings of the EMP were substantiated by the medical evidence pp 255 to pp 274. The appellant states that the EMP has been his GP at some point and felt that he was biased but the tribunal found that the clinical findings were not contradicted by the medical evidence supplied by the appellant.
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> 4. The tribunal considered that the amount of attention which the appellant required was not required for a significant portion of the day. The EMP's report of 1.12.98 p. 309 again only states help with dressing and undressing and getting in and out of a bath.
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> 5. The appellant has stated higher needs, help with changing sheets due to night sweats but there is no medical evidence to support a condition in a 34 - now 37 - year old man that would give rise to heavy night sweats. The tribunal therefore [adopts] the EMP's report and findings as to night needs.
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> 6. The appellant has stated that he has numbness in his feet and that he is prone to falls as a result. However, he drives a manual car and states that he can feel the clutch. The tribunal found this inconsistent with alleged disability and again preferred the EMP's report on supervision and as he now lives in a ground floor flat alone and is aware of common dangers he could avoid stairs as he is now in a flat. He could use sticks while moving round the flat to avoid falls. The tribunal did not consider that taking into account his age and general health that he was at risk of substantial danger if not continually supervised.
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> 7. The lowest rate of the care component had been awarded for meal preparation. The meal is only for one person. Both EMPs confirm that he could prepare the vegetables but the appellant states he has difficulty with hot pans and kettles and cannot bend to use the oven. It is not necessary to use an oven to make a hot meal for one person. The appellant could lift his food out of the boiling water with a perforated spoon and leave the pots to grow cold to

empty them. The appellant states he drops things but his upper limbs are normal [and] any difficulty could be avoided by the above stratagem.

8. The tribunal considered therefore that the appellant did not satisfy the criteria for an award of the care component under section 72 [of the Social Security] Contributions and Benefits Act 1992."

The tribunal made their decision effective from 18 March 1997. I am helpfully informed by the Secretary of State's representative that the claimant was subsequently awarded the lowest rate of the care component from 7 May 1999 to 30 April 2001, following a further application for review.

5. The principal arguments on the appeal have related to the lowest rate of the care component but it is convenient first to consider three points relating to the middle rate, the first two of which relate to the date from which the tribunal's decision should have been effective. Firstly, it seems to me to be unsatisfactory for a tribunal to rely on a report by an examining medical practitioner when an earlier tribunal, albeit differently constituted, appears to have accepted the claimant's submission that the report might not be reliable as the medical practitioner had previous knowledge of the claimant. To say that the report is not inconsistent with other evidence is not really an answer because, insofar as it is to exactly the same effect it is unnecessary to rely on the report at all and insofar as it is not exactly to the same effect the criticism is not met. On the other hand, in this particular case, the tribunal, having said that they relied on the report of 17 March 1997, do not appear to have done so to any substantial extent, except for the purpose of establishing the date from which their decision was effective. They said that they "preferred" the report but it would appear that they preferred it only to the claimant's evidence, where there was an inconsistency, and not to any other medical evidence. Their actual findings appear to be supported by the other medical evidence - in particular, the report of 1 December 1997 - and so excluding the report of 17 March 1997 would not have made any difference to the decision, save as to the date from which it was effective.

6. The adjudication officer giving the initial decision on 3 April 1997 had made the decision effective from 17 March 1997. He or she had expressly done so on the ground that the claimant's care needs had decreased and had presumably taken the date of the report as being the date of the change on the basis that that was the date most favourable to the claimant. The tribunal may be assumed to have taken the same approach as regards the date but there is nothing in their decision to suggest that they expressly considered whether there were grounds for review, under section 30(2) of the Social Security Administration Act 1992 and, more importantly, I am unable to infer from their reasoning what they considered the change might have been. On the other hand, Mr Rutledge conceded that the claimant's move to one-story accommodation was a material change of circumstances and that obviously occurred very shortly after the examination in March and does appear to have been a factor in the tribunal's decision. The claimant could not assist me as to the exact date of his move but it was plainly before 23 April 1997 and I shall take that as the material date.

7. It is not suggested that the tribunal's decision as to the "day" attention conditions can be challenged as being erroneous in point of law. As to the "night" conditions, it is argued in the grounds of appeal that the tribunal erred in not accepting

the claimant's uncontradicted evidence that he sweats a lot at night. However, what was material was whether the claimant sweated so much that he required help changing his bedding. The tribunal were not bound to accept the claimant's evidence merely because it was not contradicted, provided they gave reasons for rejecting it. They gave an adequate reason, which was that they considered it was unlikely that the claimant would have such a severe problem but not be able to produce medical evidence in support of it. I do not consider that the tribunal erred in law in so deciding.

8. Accordingly, I consider that the tribunal were quite entitled to decide that the claimant no longer satisfied the conditions for the middle rate of the care component but that they erred in failing adequately to identify any grounds for the review with the consequence that they failed to give reasons for the date from which their decision was effective. On the other hand, I am satisfied that there were grounds for review by 23 April 1997 and that is the date from which the review should have been effective.

9. I turn then to the question whether the claimant was entitled to the lowest rate. The tribunal's finding that the claimant did not require attention in connection with his bodily functions for a significant portion of the day is not challenged. What is in issue is whether the tribunal erred in disagreeing with the adjudication officers who had decided that the claimant satisfied the "cooking test". Section 72(1)(a)(ii) of the Social Security Contributions and Benefits Act 1992 provides that a person is entitled to the care component if "he is so severely disabled physically or mentally that .... he cannot prepared a cooked main meal for himself if he has the ingredients".

10. In the original grounds of appeal, a narrow point was taken on behalf of the claimant, it being argued that the tribunal had failed to have regard to the claimant's need to use crutches while cooking. The Secretary of State supports that point but also supports the claimant's appeal on much broader grounds, which Mr Rutledge adopted. It is argued that the tribunal erred in suggesting that the claimant use the stratagem of removing food from hot pans with a slotted spoon. This astonishing proposition is said to be supported by R(DLA) 2/95 where the Commissioner said:

> " .... In my view the "cooking test" is a hypothetical test to be determined objectively. Factors such as the type of facilities or equipment available and a claimant's cooking skills are irrelevant.
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> 8. The nature of the "cooked main meal" which the claimant "cannot prepare" is crucial. In my view it is a labour intensive reasonable main daily meal freshly cooked on a traditional cooker. What is reasonable is a question of fact to be determined by reference to what is reasonable for a member of the community to which the claimant belongs e.g. a vegetarian meal as opposed to one which is not. The use of the phrase "for himself" shows that the meal is intended to be just for one person, not for the whole family. The "main meal" art issue is, therefore, a labour intensive, main reasonable daily meal for one person, not a celebration meal or a snack. The main meal must be cooked on a daily basis and it is irrelevant that a claimant may prepare, cook and freeze a number of main meals on the days that help is provided and then defrost and heat them in a microwave on subsequent days. The test depends on what a claimant cannot do without help on each day. Because the

main meal has to be cooked, the test includes all activities auxiliary to the cooking such as reaching for a saucepan, putting water in it and lifting it on or off the cooker. All cooking utensils must of course be placed in a reasonable position.

9. The word 'prepare' emphasises a claimant's ability to make all the ingredients ready for cooking. This includes the peeling and chopping of fresh vegetables as opposed to frozen vegetables which require no real preparation. However, in my view a chop, a piece of fish or meat ready minced does not fall in the category of 'convenience foods' and are permissible as basic ingredients. I should add for completeness that because the test is objective it is irrelevant that a claimant may never wish to cook such a meal or that it is considered financially impossible.

10. ....

11. As stated the 'cooking test' is objective and is not dependent on the type of facilities or equipment available to a claimant. The DAT further erred in law in that they considered that the test of the claimant's ability to cook a main meal was to be limited by reference to the use of special kitchen appliances to compensate for her disability, without explaining in any detail what appliances they had in mind and how they would help. In my view if a claimant cannot, given normal reasonable facilities (which might include certain devices to assist) perform the tasks necessary to prepare a main meal then the condition of section 72(1)(a)(ii) of the Act will be satisfied. Once it is established that the claimant is unable to perform those tasks it is not necessary in the context of the "main meal" test to consider whether that inability can be overcome by specially adapting the kitchen or making alternative arrangements. The test is designed as a measure of the claimant's ability to perform specific daily tasks. The 'cooking test' concentrates on the extent of a claimant's abilities and not on the need for help, unlike the attention and supervision conditions contained in section 72(1)(a)(i), (b) and (c) of the Act where the test is that the disabled person must 'require' attention or supervision. If an alternative to attention or supervision is reasonably available then the attention or supervision cannot be said to be required."

11. Miss Rayner relied on the last part of paragraph 11 for the proposition that the purpose of the test is not to see whether claimants can cope and she based on that proposition a further proposition that the test did not envisage a claimant using any alternative to the most conventional methods of preparing a meal. That seems to me to show a misunderstanding of what the Commissioner was saying. In R(DLA) 1/97, I said that the reason the language of section 72(1)(a)(ii) is different from that in section 72(1)(a)(i), (b) and (c) is that the test in the former provision is a hypothetical test, as was made clear in R(DLA) 2/95. Plainly, if a claimant is unable to prepare a cooked main meal for himself, he requires help if such a meal is to be prepared. What, the Commissioner was pointing out in R(DLA) 2/95 is that it may be wholly unnecessary for such a main meal to be prepared and so help may not actually be required. That is because relying much of the time on largely pre-cooked meals may well be satisfactory as a means of keeping oneself fed. The ability to re-heat pre-cooked meals is not sufficient to prevent a claimant from satisfying the condition of

section 72(1)(a)(ii). In that sense, I would agree with Ms Rayner that the test is not to see whether claimants can cope. However, none of that is relevant to the question whether a tribunal may have regard to unconventional methods of preparing a cooked main meal for one using basic ingredients. In other words, while the test is not a test of whether a claimant can cope with preparing a cooked main meal if the use of pre-cooked convenience foods is taken into account, it *is* a test of whether a claimant can cope with preparing a cooked main meal for one using basic ingredients. The statutory language is unambiguous.

12. In R(DLA) 2/95 the Commissioner expressly said that regard could be had to "certain devices to assist". Ms Rayner drew attention to the Commissioner's use of the word "might" but that seems to me merely to be recognition that a claimant might not have such devices and that it might not be reasonable to expect the claimant to obtain them. Ms Rayner also sought to draw a distinction between devices and stratagems but I see no relevant distinction. People with disabilities use both devices and stratagems to mitigate the effects of their disabilities in everyday life. A person who, using reasonably available devices and stratagems, can prepare a cooked main meal for himself if he has the ingredients cannot be said to satisfy the statutory test. In any event, a slotted spoon is not, in my opinion, a special device and using one to remove food from a pan is not a stratagem that is in any way unusual. Many able-bodied cooks use slotted spoons in that way, even if they do not *always* do so in preference to draining water from a pan.

13. Both Mr Rutledge and Ms Rayner argued that taking account of the possibility of using special devices or stratagems would make the test more complicated than intended. I do not agree. Such considerations have always been taken into account in relation to the attention and supervision tests. For instance, it has long been accepted that the ability of a claimant to use a urine bottle instead of going to a lavatory may be taken into account in considering whether he requires attention in connection with his bodily functions. Decision-makers, examining medical practitioners and tribunals all have material experience and training and claimants themselves, when asked whether they can prepare a meal, are likely to take account of devices and stratagems they use. It may be that the current claim form and the advice to decision-makers and examining medical practitioners require some minor amendment but that is not an indication that taking account of devices and stratagems is particularly complex.

14. The Secretary of State's written submission also suggested that the "cooking test" necessarily involved the use of an oven, but, as was conceded in the claimant's grounds of appeal, the Commissioner who decided R(DLA) 2/95 has held that not to be so (CDLA/1469/95). Mr Rutledge submitted that the test was intended to be a test of, among other things, bending. I disagree. No doubt, in the many cases where it is considered reasonable for a claimant to use a conventional oven at a conventional height the test will involve a test of bending, but that is not necessarily so. The legislation makes provision for a test of preparing a meal and, if it is reasonable to expect a claimant to prepare a meal without bending, it is unnecessary to consider his capacity to bend. Mr Rutledge suggested that statements in Parliament supported his view and he referred me what was said by the Minister of State in the House of Lords (HL Vol. 526, col. 1546). Similar statements were made by the Secretary of State in the House of Commons (HC Vol. 181, col. 313). I do not consider that there is any ambiguity in the legislation such as would entitle me to have regard to what was said

in Parliament (*Pepper v. Hart* [1993] AC 593) but, in any event, I do not consider that the Parliamentary statements support Mr Rutledge's case. The cooking test was said to be "abstract", in the sense that people would not be excluded merely because they would not in practice ever have wished to cook for themselves, and it was said to be intended to be amenable to self-assessment. Nothing was said about deeming people to be unable to prepare a main meal when in fact they could do so by using special devices or stratagems.

15. Of course, one must have regard only to those devices and stratagems that it is, or would be, reasonable to expect a claimant to use, but it can hardly be suggested that slotted spoons are not readily obtainable by anyone who does not have one. I do not consider that the tribunal erred in law merely because they decided that the claimant might reduce any substantial risk of danger to himself by using a slotted spoon to remove food from pans and then allow the pans to cool before removing them from the cooker.

16. The parties are, however, on stronger ground on their narrower point. There was evidence that the claimant used two walking sticks and, indeed, the tribunal suggested that his use of those sticks indoors was a way of reducing the risk of falling so that they obviously accepted the claimant's case on this issue at least in part. In those circumstances, it is argued that the whole question of whether it was reasonably practical for him to cook at all had to be addressed and that the tribunal erred in dealing only with the risk of danger through dropping a pan of boiling water. It is said that there are obvious difficulties in carrying anything, whether hot or cold or whether as heavy as a pan of water or as light as a slotted spoon full of vegetables. The counter-argument, of course, is that it may be equally obvious that the claimant could sit, or at least put down one of his sticks, while carrying out many of the tasks involved in preparing a cooked main meal and that, as I decided in R(DLA) 1/97, the fact that some degree of risk remains does not necessarily mean that the claimant is to be regarded as unable to prepare such a meal. However, Mr Rutledge did not argue that the decision was one that the tribunal could not reasonably have reached. He argued simply that the chairman had not recorded adequate reasons for the decision, given that the claimant's case had been that he was unable even to make a cup of tea due to his disability, and that it was not obvious that they had actually considered whether sitting or using one stick were realistic strategems for the claimant. He further argued that particular care should be taken to provide full reasons for a decision where a tribunal had reached a decision less favourable than the decision under appeal. In the particular circumstances of this case, I accept Mr Rutledge's submissions, supported as they were by Ms Rayner.

17. Ms Rayner told me that she was neither instructed to concede that the claimant was entitled to the lowest rate of the care component nor instructed actively to oppose an award. Mr Rutledge asked me to make an award in the claimant's favour. I did not hear oral evidence from the claimant but I do not consider that I should trouble another tribunal with this case. I presume that the lowest rate of the care component was in fact paid until the tribunal's decision was given in late January 1999 and that there is no realistic likelihood of the Secretary of State regarding any overpayment as recoverable even if it is decided that the claimant was not entitled to the care component from April 1997. As a fresh award was made from early May 1999, only about four months' benefit is really in issue and that four months was two years ago.

Two adjudication officers decided that the claimant was entitled to the lowest rate of the care component and the Secretary of State has since made a further award. The decisions of the adjudication officers may have been made without a particularly detailed investigation but they were both made in the light of the opinion of an examining medical practitioner that the claimant could not cope with hot pans. Even before section 12(8)(a) of the Social Security Act 1998 was enacted, a tribunal were not obliged to go behind that much of a decision under appeal as was favourable to a claimant, unless the adjudication officer had resiled from it or it was obviously questionable. The tribunal in the present case did not err in considering whether the claimant satisfied the conditions of entitlement to the lowest rate of the care component, but they could quite properly have decided not to question the adjudication officers' decisions on that issue. Given the further passage of time, I consider that I should not be too ready to go behind the adjudication officers' decisions, even though the tribunal's conclusion may have been open to them. Like the adjudication officers, I accept that the extent to which the claimant was liable to drop things or to fall, taken with the difficulties he had with getting around, meant that he could not reasonably have been expected to prepare a cooked main meal for himself if he had been provided with the ingredients. I also accept the evidence that the claimant had not in fact been cooking for himself even though he lived alone and, while that is not determinative, it is some indication that he did have real difficulties as he does not appear to have been eating adequately. I can therefore properly substitute my own decision for that of the tribunal and restore the adjudication officer's decision for the period from the date from which the review should have been effective to the date immediately before the commencement of the subsequent award. The claimant should not, however, assume that any decision given in the future will necessarily be favourable to him.

18. I allow the claimant's appeal. I set aside the decision of the Harlow disability appeal tribunal dated 28 January 1999 and substitute my own decision. The decision of the adjudication officer dated 25 February 1996 is reviewed in respect of the care component on the ground that there was a material change of circumstances when the claimant moved to a flat. With effect from 23 April 1997 to 6 May 1999, the claimant is entitled to the lowest rate of the care component. The effect of this decision is to extend entitlement to the middle rate of the care component to 22 April 1997. Benefit paid in consequence of the adjudication officers' decisions of 3 April 1997 and 23 April 1997 is to be treated as having been paid on account of this decision. I have not considered entitlement to the mobility component.

M. ROWLAND
Commissioner
2 March 2001