

Bulletin 162

① can use info on Affidavit
for VLA review, but must be fully
compatible

SOCIAL SECURITY AND CHILD SUPPORT COMMISSIONERS

Commissioner's File No.: CDLA/5803/1999 ② C/P - statement about
disturbance can only
with out review

Starred Decision No: 33/01

disruption is not
statement of fact.
is simply statement of
belief

Commissioners' decisions are identified by case references only, to preserve the privacy of individual claimants and other parties.

***Starring** denotes only that the case is considered to be of general interest or importance. It does not confer any additional status over an unstarred decision.*

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Any **comments** by interested organisations or individuals on the suitability of this decision for reporting should be sent to:

Mr P Cichosz,
Office of the Social Security and Child Support Commissioners,
5th Floor, Newspaper House, 8-16 Great New Street, London EC4A 3BN.

so as to arrive by 4th June 2001

Comments on Northern Ireland Commissioners' decisions will be forwarded to the Northern Ireland Chief Commissioner.

Decision:

1. My decision is as follows. It is given under section 14(8)(b) of the Social Security Act 1998.
 - 1.1 The decision of the Sunderland disability appeal tribunal held on 1st September 1998 is erroneous in point of law: see paragraphs 18, 22, 23, 37, 39 and 51.
 - 1.2 Accordingly, I set it aside and, as it is not expedient for me to give a decision on the claimant's appeal to the tribunal, I refer the case to a differently constituted tribunal for determination.
 - 1.3 I direct the tribunal that rehears this case to conduct a complete rehearing. In particular, the tribunal must follow my directions in paragraphs 18, 20, 22, 24, 29, 37, 39 and 51.

Before this case is listed for rehearing, I direct that it must be put before a legally qualified panel member to consider whether it is necessary or desirable to give directions under regulation 38(2) of the Social Security and Child Support (Decisions and Appeals) Regulations 1999. In particular, the panel member will want to obtain, if possible, a better copy of the examining doctor's report on walking and the claimant's self-assessment questionnaire on capacity for work: see my comments in paragraphs 7 and 51. A further submission from the Secretary of State may be needed to deal with the issues raised in this decision, especially the explanation for the use of 29th January 1997 as the start of the overpayment period.

The appeal to the Commissioner

2. This is an appeal to a Commissioner against the decision of the disability appeal tribunal brought by the claimant with the leave of Mr Commissioner Howell. As the Social Security Act 1998 is now in force in respect of disability living allowance, the Secretary of State, and not the adjudication officer, is a party to the proceedings on this appeal. The Secretary of State supports the appeal. The officer invites the Commissioner to decide that the overpayment in this case is not recoverable. I decline to give that decision, because there are issues of fact that need to be investigated.

The history of the case*The disability living allowance claim and award*

3. In January 1997, the claimant made a claim for a disability living allowance. He signed the claim pack on 21st January 1997 and it was received by the Department of Social Security on 23rd January 1997. He completed only the mobility section of the pack. He attributed his difficulties to pain in the lower spine, knees and hips. He estimated that he could only walk 35 yards on a good day, although sometimes the hip pain was almost immediate. He signed to certify that the 'information I have given about the help needed with **getting around** is correct and complete.'

4. A report was obtained from the claimant's GP. The doctor wrote on 29th January 1997 that the claimant could walk 40 yards without experiencing severe discomfort and that the claimant had stated that this would take ½ minute.

5. On 3rd February 1997, an adjudication officer awarded a disability living allowance consisting of the mobility component at the higher rate from and including 23rd January 1997.

The capacity for work assessment

6. At the same time as the claimant was applying for a disability living allowance, his capacity for work was being assessed.

7. He completed a self-assessment questionnaire. I do not know what difficulties he identified for the activity of walking, because a copy of the questionnaire is not in the papers. There is a poor photocopy of the medical report by the examining doctor dated 20th January 1997. It records that the doctor did not agree with the claimant's own assessment. I do not know what estimate the doctor gave of the claimant's walking ability, because that part of the page has been cut off in photocopying. However, the doctor wrote under 'Details of activities of daily living' that the claimant probably walked ¼ mile.

8. I do not know what decision the adjudication officer reached on the claimant's disability under the activity of walking. It is not referred to anywhere in the papers.

The review of the disability living allowance award

9. When the capacity for work evidence was discovered, the claimant was visited by an examining medical practitioner. The report was written on 16th June 1997, but I do not know when it was received by the Department of Social Security. The doctor found full function in the claimant's lower limbs, although the claimant complained of discomfort in his back when his hips and knees were being examined. The doctor estimated that the claimant could walk ½ mile on the flat slowly in 15 minutes with perhaps one halt for one minute because of pain in the back and legs. The claimant's gait was described as somewhat stiff and his balance as good.

10. The Secretary of State applied to an adjudication officer for a review of the decision making the award. Although the review was conducted under section 30(2) of the Social Security Administration Act 1992, the adjudication officer did not expressly identify a ground for review. The officer's revised decision was that the claimant was not entitled to a disability living allowance from and including 23rd January 1997 (the effective date of the award). The officer also decided that the claimant had been overpaid for the inclusive period from 29th January 1997 to 24th June 1997 in the sum of £719.60. The overpayment was recoverable because the claimant had misrepresented the material fact that he was only able to walk 35 yards on a good day before the onset of severe discomfort.

11. The claimant applied for a review of that decision. It was reviewed by a different adjudication officer under section 30(1) of the 1992 Act, but the decision was confirmed. The claimant appealed against that decision to a disability appeal tribunal. His GP wrote a letter stating that the claimant's walking ability varied between 6 steps and 100 yards.

The tribunal's decision

12. The decision notice records the tribunal's decision that the claimant was not entitled to a disability living allowance from and including 29th January 1997 (not 23rd January) and that the overpayment of £719.60 was recoverable from him. The summary of grounds records that the receipt of the capacity for work evidence was a change of circumstances that was sufficient to instigate the review process. The misrepresentation was recorded in the same terms as in the adjudication officer's decision.

13. The full statement of the tribunal's decision repeats that there was a change of circumstances in the receipt of the capacity for work evidence. Later the statement records that there had been no improvement in the claimant's walking ability between January and June 1997 and that

‘The only conclusion which could be drawn was that [the claimant] had deliberately underestimated his walking ability for the purpose of claiming DLA.’

The issues

14. This case raises a number of issues.

Grounds for review

15. The adjudication officer did not expressly identify grounds for review. As the termination was founded in a section 30(2) review, this was necessary. The tribunal was right to consider grounds for review.

16. The tribunal's decision may be contradictory on the ground for review. On the one hand, both the decision notice and the full statement of the tribunal's decision refer to a change of circumstances, identified as the receipt of the capacity for work evidence. On the other hand, the statement also records that there had been no improvement between January and June, suggesting that the proper ground for review was error of fact.

17. I can only speculate on the reason for this apparent contradiction. It may be that the tribunal intended to distinguish between grounds for review (change of circumstances) and grounds for revision (error of fact). If that was its intention, it did not make it clear. Another possibility is that as the overpayment ran only from 29th January 1997, the tribunal considered that the review could only be based on a change of circumstances.

18. Whatever the reason, this confusion makes the tribunal's decision erroneous in law. At the rehearing, the tribunal must determine whether there were grounds for review. The most likely ground is an error of fact.

Was the claimant virtually unable to walk?

19. There was evidence of the claimant's mobility in his claim pack, his GP's report for the adjudication officer and later letter for the tribunal, the report of the examining doctor on capacity for work, and the examining medical practitioner's report. The tribunal preferred the examining medical practitioner's evidence, because the doctor was disinterested, informed

and had made full clinical findings. It was entitled to prefer that evidence and it adequately explained its choice.

20. There is no error of law in the tribunal's decision on this issue. At the rehearing, the appeal tribunal must make its own decision.

What was the effective date of the termination?

21. The adjudication officer terminated the award from and including 23rd January 1997. The tribunal used 29th January 1997. That may have been a slip. Or the tribunal may have intended to bring this date into line with the start date for the overpayment period.

22. The use of a different date from the adjudication officer should have been explained by the tribunal. It did not do that and that makes its decision erroneous in law. If the appeal tribunal at the rehearing confirms the termination of the award, it must determine the effective date of its decision.

The overpayment period

23. I do not know why the overpayment ran only from 29th January 1997. This happens to be the date of the report written by the claimant's GP. But that should not be significant. The adjudication officer did not explain this date. Nor did the tribunal. That makes its decision erroneous in law.

24. At the rehearing, the tribunal must determine the period of any overpayment that has arisen.

Cross-benefit evidence

25. The adjudication officer was entitled to make use of evidence obtained for the purposes of another benefit. However, care has to be taken to ensure that the evidence is properly comparable.

26. The tests for the activity of walking for the all work test and for the mobility component of disability living allowance are different. A claimant's walking ability may be differently assessed under each, depending on the difficulties that limit mobility.

27. Take first a claimant who is able to walk a total distance of 100 metres before experiencing severe discomfort, but who has to pause briefly every 20 metres or so. That claimant would probably not be virtually unable to walk. However, the claimant would score 15 points under the all work test, because that test is concerned with the ability to walk 'without stopping or severe discomfort'.

28. Take next a claimant who can 100 metres without stopping or severe discomfort, but whose speed of progress is very slow and whose balance is poor. That claimant would only score 7 points under the all work test, because speed and balance are not relevant. However, the claimant might be virtually unable to walk, because time, speed and manner of walking are all relevant under disability living allowance.

29. As the tribunal dealt with the case on the basis of the examining medical practitioner's evidence, it did not have to consider the capacity for work evidence. If that evidence is taken into account against the claimant at the rehearing, the tribunal must analyse in the light of my comments.

Causation

30. Three issues arise on causation.

What was the cause of the overpayment?

31. Did the adjudication officer make the award of disability living allowance on the basis of (a) the claimant's evidence in the claim pack, (b) his GP's evidence or (c) both?

32. I have commented elsewhere on the problems that arise from the failure to record the factual basis of a first tier decision on disability living allowance. In the absence of a record, the basis of an award can only be determined on probabilities given the evidence available.

33. If an award is made and the only evidence before the adjudication officer was the claimant's estimate of walking ability, the award must have been based on the claimant's evidence.

34. If evidence is obtained from a GP (or other source) that differs significantly from the claimant's evidence, it is reasonable to assume that the award was based solely on the other evidence and that the claimant's evidence was rejected.

35. If evidence is obtained from a GP (or other source) that is broadly the same as the claimant's evidence, it is more difficult to identify the evidence relied on. There are four possibilities. First: the adjudication officer relied on the claimant's evidence, because it was corroborated by the other evidence. Second: that the adjudication officer relied on the other evidence, because it was more independent and objective than the claimant's. Third: the adjudication officer relied on both. Fourth: the adjudication officer relied only on the claimant's evidence, because the other evidence did no more than record what the person had been told by the claimant. Depending on the circumstances, some of these possibilities may be more likely than others.

36. Although it is difficult to identify the evidence relied on by the adjudication officer, causation may be more easily established. If the claimant's was the only evidence relied on, the claimant caused the overpayment. If the claimant's evidence was part of the evidence relied on, it was a cause of the overpayment; it is irrelevant that there was also an additional cause: see the decision of the Court of Appeal in Duggan v. Chief Adjudication Officer (reported as an Appendix to the decision of the Commissioner in R(SB) 13/89), which has been followed in Scotland in Riches v. Secretary of State for Social Security [1994] Scottish Law Times 730 at page 734. The only circumstance in which the claimant will not have caused the overpayment is if (a) the other evidence was the only evidence relied on and (b) it did more than merely report the claimant's evidence.

37. In this case, the tribunal did not deal with the issue of causation. That made its decision erroneous in law. At the rehearing, the appeal tribunal must determine whether the award was based on (a) the evidence of the claimant, (b) on the evidence of his GP or (c) on both.

When did the overpayment cease to be caused by the claimant?

38. I do not know when the capacity for work evidence was obtained by the disability living allowance unit. It is possible that the report was not sufficiently specific to show that the award of disability living allowance was wrongly made. The report of the examining medical practitioner certainly showed that. Unfortunately, although I know the date when it was written, I do not know when it was received. It was written over a week before the adjudication officer's decision. It is possible that it may have been received by the disability living allowance unit in sufficient time to stop a payment of benefit before the date of the adjudication officer's decision. If that was possible, the period of the recoverable overpayment should have ended before 24th June 1997.

39. The tribunal did not deal with that issue. That makes its decision erroneous in law. At the rehearing, the appeal tribunal must determine whether at some time before 24th June 1997 the overpayment ceased to be caused by the claimant and became attributable to delay in dealing with the review.

CIS/222/1991

40. The Secretary of State has relies on this case to support the argument that the claimant did not cause the overpayment.

41. The case decided that an adjudication officer was under a duty to investigate when answers on a claim form were plainly inconsistent and ambiguous. The reason was that the adjudication officer was not able to make the finding of fact on which to decide the claim without investigating further to establish which of the conflicting answers given by the claimant was correct. I respectfully agree with that decision.

42. It is said to be relevant in this case, because the claimant had told the disability living allowance unit that he had failed the all work test. This, the Secretary of State argues, was sufficient to put the unit on notice that the claimant's mobility might not be as restricted as he stated on his disability living allowance claim pack.

43. I reject that argument, because it is not supported by the evidence quoted. That evidence is at page 61. It is the note of a telephone call made by the claimant on 25th January 1997. It does not report that he has failed the all work test. It says that he is not receiving any 'incapacity/invalidity benefit'. That does not mean that he failed the all work test, as he may have been on income support. Anyway, given the date of the medical examination, I doubt if he knew the adjudication officer's decision on his capacity for work by 25th January 1997.

Did the claimant misrepresent a material fact?

44. The adjudication officer and the tribunal decided that the claimant misrepresented the material fact that on a good day he could walk 35 yards before the onset of severe discomfort. Were those statements of fact?

45. It is notoriously difficult to judge time and distance. That is self-evident from common experience, even to Commissioners: see the remarks of the Commissioner in CM/80/1988, paragraph 5. A claimant's statement of distance in the mobility section of a claim pack cannot be read as a precise distance. The claimant probably has in mind a particular route, such as

that from the bus stop to the doctor's surgery. What is stated on the claim pack is an estimate of that distance.

46. The estimate becomes even more unreliable when severe discomfort is taken into account. The claimant is asked to state 'how far you can walk before you feel severe discomfort'. What precisely constitutes severe discomfort cannot be defined with precision. Inevitably, the form does not give the claimant any guidance. So, the answer can only be based on the claimant's own view of when severe discomfort begins.

47. Taking together the difficulties in judging time and distance and the vagueness and uncertainty over severe discomfort, produces this result. The claimant's answers to the mobility section of the claim pack can usually only fairly be interpreted as statements of the claimant's honest opinion. (The terms of the answers may, of course, show that they are more than that, but that is not the position in this case.)

48. The claimant signs a declaration that the 'information given' is correct and complete. That information is the claimant's genuine belief as to the matters stated. There will be a misrepresentation, if the claimant does not genuinely believe that the information given is correct.

49. Whether the claimant did genuinely believe the answers given is a question of fact for the tribunal. It is not for a Commissioner to tell an appeal tribunal how to set about answering a question of fact or assessing the credibility of a claimant's credibility. However, I make three points in order to avoid any misunderstanding. First, the tribunal does not have to accept the claimant's word that the answers given were honest. Second, the tribunal will have to determine the extent of the claimant's mobility. The more that differs from the claimant's own statements, the more likely it is that the claimant did not believe the information given in the claim pack. Third, the fact that a claimant has made different statements for different purposes will be relevant, although the terms of the questions asked must be taken into account.

50. I have not overlooked that a misrepresentation may be entirely innocent. What I have decided is that as a matter of interpretation, the statements in the mobility section of the claim pack are usually only statements of honest belief.

51. The tribunal did not deal with this issue. That makes its decision erroneous in law. At the rehearing, the tribunal must determine whether the claimant genuinely believed that his statements in the mobility section of the claim pack were correct. The appeal tribunal will need to know whether the claimant's answers on the self-assessment questionnaire for capacity for work were consistent with his answers on the disability living allowance claim pack. It must also take into account the information he gave to the examining doctor at the capacity for work medical.

Signed on original

**Edward Jacobs
Commissioner
22nd February 2001**