Bulletin 163 7
(Start)

SOCIAL SECURITY AND CHILD SUPPORT COMMISSIONERS

Commissioner's File No.: CDLA/7482/1999

Starred Decision No: 17/01

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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

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17/01.

CDLA/7482/1999

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. The claimant's appeal is allowed. The decision of the Birmingham disability appeal tribunal dated 17 February 1999 is erroneous in point of law, for the reasons given below, and I set it aside. The appeal against the adjudication officer's decision dated 25 August 1998 is referred to an appeal tribunal constituted under the Social Security Act 1998 for determination in accordance with the directions given in paragraphs 19 to 28 below (Social Security Act 1998, section 14(8)(b)).

The background

2. Before March 1998 the claimant was entitled to the middle rate of the care component of disability living allowance ("DLA") from 29 July 1992 for life. At the date of the decision making that award (26 June 1992) the claimant was apparently entitled to the mobility component of DLA for life, under an award of mobility allowance which had been converted to mobility component. However, the basis for this conversion is obscure as the award of mobility component was said on the first page of the form DL4 to have been for the period down to 8 July 1995 (see paragraph 21 below).

3. In 1998 the claimant was sent a questionnaire covering both care and mobility needs, which she completed and signed on 12 March 1998. A report was obtained from her GP and she was examined by an examining medical practitioner ("EMP") on 26 June 1998. I shall not set out all the findings on care. The EMP found the claimant's left knee swollen and painful with a 10% limitation on movement. He found the right knee swollen and painful with a limitation on movement and a fixed flexion deformity. He reported that the claimant's walking was not tested out of doors in view of her disability, but gave the opinion that her maximum walking distance outdoors was less than 100 yards.

4. On 7 July 1998 the Secretary of State applied to the adjudication officer for a review of the decision awarding the claimant the care component (although by mistake the date of that decision was given as 18 July 1991). The ground put forward was relevant change of circumstances, in the form of a reduction in care needs. On the same day the adjudication officer carried out a review on that ground and gave the revised decision that the claimant was not entitled to the care component from and including 26 June 1998. He recorded that he had not considered entitlement to or the rate of payment of mobility component. Among the legislation noted as used was section 32(4) of the Social Security Administration Act 1992.

5. The claimant applied for second-tier review. On 25 August 1998 a second adjudication officer confirmed the first decision, again without considering the mobility component, but having referred to section 32(4). The claimant appealed against the second-tier review decision. She named a representative from a neighbourhood office and asked for an oral hearing.

The DAT's decision

6. The claimant attended the hearing before the disability appeal tribunal ("DAT") on 17 February 1999 without any representative. The DAT's decision was that the claimant was not entitled to the mobility component of DLA and was entitled to the lowest rate of the care component from 26 June 1998. The chairman's record of proceedings seems to show a concluding submission by the presenting officer (representing the adjudication officer) that the DAT had powers under section 33 of the Social Security Administration Act 1992 in relation to the mobility component. There is no record of any warning to the claimant that her mobility component was at risk, although she had been questioned by the presenting officer about her walking ability.

7. The full statement of findings of fact and reasons contained the following:

> "Facts Found
> [The claimant] is aged 55 and suffers from Osteoarthritis Chronic Bronchitis and Asthma. Her application had been refused in respect of all components on the first consideration and review. She sleeps throughout the night and has no night needs and is able to get up and wash and dress herself, put herself to bed and look after herself during the day. She cannot lift, turn taps on and although she can prepare food such as beans on toast she cannot cook a main meal. She can walk to the bus stop needing two buses to get to the tribunal and can push a trolley round a supermarket.
>
> Reasons
> There was a very good report from the BAMS Doctor who confirmed the diagnosis and gave a very clear report. Although he confirmed some slight impairment of movement in the Appellant's legs and limitation in walking this was to 100 yards. With the evidence we read and heard it was clear that [the claimant] could walk within the requirements of the regulations. From what she told us she needed no attention at night and although she was slow she could manage her bodily functions and during the day did not require any attention. She did however confirm to us that she had difficulty in lifting turning taps and holding. The Tribunal were of the view that she could not cook a main meal.

Subject to this they upheld the rest of the AO's case but granted the lower care component due to her being unable in our view on what we had seen and heard to cook a main meal."

8. The claimant now appeals against the DAT's decision with the leave of a Commissioner. The appeal is supported on behalf of the Secretary of State, but neither of the submissions of 13 August 2000 or 14 September 2000 is sufficiently comprehensive and legally sound to form a proper basis on which a new appeal tribunal could approach a rehearing of the appeal against the adjudication officer's decision of 25 August 1998. On the other hand, while I must deal with the submission dated 20 November 2000 by the claimant's current representative, I do not accept his suggestion that I am in a position to substitute a decision on the appeal.

The care component

9. I look first at the DAT's decision on the care component. I reject the submission of the claimant's representative that the adjudication officers' decisions of 7 July 1998 and 25 August 1998 were erroneous in law by virtue of section 32(4) of the Social Security Administration Act 1992, and that therefore so was the DAT's decision. Both the decisions of 7 July 1998 and 25 August 1998 did refer to section 32(4). I agree that it would have been much better if the standard forms used by adjudication officers had dealt expressly with the protection given to life awards by section 32(4) and with the question whether information was available giving reasonable grounds for believing that entitlement to the component in question, or its rate, should continue. However, such information had been put forward in the present case by the Secretary of State, who had asked for the reports from the GP and the EMP. As reference had also been made to section 32(4), there was not an automatic error of law which also infected the DAT's decision.

10. However, it is plain that the DAT erred in law in failing to consider the case as one stemming from a review on the application of the Secretary of State of an existing life award in favour of the claimant. The chairman might be excused personally for some vagueness in the full statement, because the prompt request for one did not reach him until nearly five months after the hearing. However, the full statement stands as the expression of the DAT's reasoning. The statement treats the case as if it stemmed from claim by the claimant or at least an application for review asking for additional entitlement to DLA. There is no reference at all to any ground of review in relation to the care component, or any explanation of why the entitlement to the lowest rate of the care component was made to run from 26 June 1998.

11. The submission to the contrary in the Secretary of State's submission of 14 September 2000, resiling from what had been

said in the submission of 13 August 2000, is misconceived. In particular, the reliance on Commissioners' decisions CDLA/1820/1998 (paragraphs 15 to 17) and CDLA/2171/1999 is misconceived.

12. Mr Commissioner Jacobs in CDLA/1820/1998 was considering a case where the factual basis of an award by an adjudication officer was unknown. He suggested that a DAT might be held to have sufficiently dealt with the issue of review in substance if it made enough findings of fact to show that the claimant was currently not entitled to the component of DLA in question. There must either have been error or mistake of fact or law by the adjudication officer or a relevant change of circumstances. It would then be acceptable for the DAT to make the revised decision run from the date of the hearing, if there was no question of possible recovery of any benefit paid down to that date and no need to specify whether the proper date for review and revision ought to have been earlier (eg if review was justified on error or mistake of fact or law or if the change of circumstances had occurred earlier). Those suggestions must not be read, and in my view were not intended to be read, as laying down any rule of thumb excusing failures to deal with review or to state a date from which a revision is operative. What express findings and reasons will in substance adequately deal with the question of review will depend on the individual circumstances of each case. What was said in CDLA/1820/1998 cannot excuse a failure, as in the present case, even to treat the case as one of review in substance (where the burden of proof of an outcome adverse to the claimant is on the Secretary of State).

13. Mr Commissioner Rowland's decision in CDLA/2171/1999 was concerned mainly with the question of specifying the effective date of a review and revision. I return to CDLA/2171/1999 and CDLA/1820/1999 below, in relation to the mobility component.

The mobility component

14. The DAT also erred in law in relation to the mobility component. I proceed for present purposes on the basis that the claimant did have an award of the higher rate of the mobility component for life, which was clearly the basis on which payment of benefit had been made for many years. As the two adjudication officer's decisions below did not consider the mobility component, the DAT could only consider it if the conditions of section 33(6)(ii) of the Social Security Administration Act 1992 were met. Information had to be available to it giving it reasonable grounds for believing that entitlement to the mobility component, or to the higher rate, or for life, ought not to continue. And it was not open to the DAT to ask questions of the claimant to obtain such information if the conditions of section 33(6)(ii) had not already been met (see Commissioners' decisions CDLA/5793/1997 and

CDLA/5552/1999, and the Court of Appeal in Ashraf v Secretary of State for Social Security (2 December 1999) accepting paragraph 19 of CDLA/13008/1999). The asking of such questions would be a prohibited consideration of the mobility component. The position before the hearing has to be examined.

15. In the present case, I do not need to decide whether or not the evidence of the EMP's report, when his opinions in relation to walking are looked at fully and accurately, was capable of amounting to information giving reasonable grounds for believing that entitlement to the higher rate of the mobility component ought not to continue (the GP in effect said that he did not know the claimant's exact condition at the date of his report). That is because, putting the position at its worst for the claimant, the issue was so finely balanced that the DAT needed to state expressly a reasoned conclusion that the conditions of section 33(6) were met before it could go on to take into account the claimant's answers to its questions on 17 February 1999. The DAT did not do so. The basis for the questioning of the claimant was not established, so that the legal basis for consideration of the mobility component was missing. In addition, although the presenting officer appears to have raised the question of the mobility component at the end of the hearing and to have mentioned section 33, there is no record of the claimant having been given any opportunity to respond or to ask for an adjournment to seek advice or further evidence. She was not represented at the hearing. She was plainly not given a fair opportunity to answer the case on the removal of the mobility component and there was a breach of the principles of natural justice (see paragraphs 11 to 13 of CDLA/1820/1998).

16. Finally, the DAT left the effective date of review and revision of the mobility component obscure. Was it 26 June 1998, the same date as for the review and revision of the care component, or was it the date of the hearing? The decision notice did not say, nor was the matter clarified in the full statement. CDLA/1820/1998 and CDLA/2171/1999 authorise the choosing of an effective date on a common sense basis, at least where a difficulty in identifying the technically correct date is a result of the deficiencies in information-recording by adjudication officers and nothing of practical importance turns on the date. The decisions certainly do not authorise a failure by a DAT to state sufficiently clearly (either expressly, which is best, or by necessary implication, for instance from a generalised acceptance of an adjudication officer's submission) what the effective date of review and revision is. In the present case, the DAT's decision plainly failed on that basis.

17. I believe that Commissioner's decision CDLA/1820/1999 is routinely being relied on in submissions on behalf of the Secretary of State to support propositions of law which are misconceived. That may be for the reasons set out in paragraph

12 above or in paragraph 16 above or both. The decision should only be relied on within the limits discussed above.

The Commissioner's decision

18. For the reasons given above, the DAT's decision must be set aside as erroneous in point of law. I consider that an assessment of all the evidence on the care component, including the further letter of 28 (or possibly 23) February 1999 from the claimant's GP, should be made by a body to which the claimant has had the opportunity of giving evidence in person and which has the particular expertise of the members of an appeal tribunal. The claimant's appeal against the adjudication officer's decision of 25 August 1998 is therefore referred to an appeal tribunal constituted under the Social Security Act 1998 and regulation 36(6) of the Social Security and Child Support (Decisions and Appeals) Regulations 1999 for rehearing in accordance with the directions given below. No-one who was a member of the DAT of 17 February 1999 is to be a member of the new appeal tribunal.

Directions to the new appeal tribunal

19. There must be a complete rehearing of the claimant's appeal on the evidence produced and submissions made to the new appeal tribunal, which will not be bound by any findings made or conclusions expressed by the DAT of 17 February 1999.

20. The claimant's appeal expressly raises only the care component. So new appeal tribunal must consider that component, free of the prohibition in section 33(6) of the Social Security Administration Act 1992. But in considering the adjudication officer's decision under appeal the new appeal tribunal should in my view ask itself whether the threshold test of section 32(4) is met (although that is unlikely to raise any problems). If that test is met, the new appeal tribunal must go on to ask itself whether the Secretary of State has shown that a ground exists to review the adjudication officer's decision dated 26 June 1992 awarding the claimant the middle rate of the care component (for day needs) from 29 July 1992 for life and that the revised decision should be adverse to the claimant. The case is still one of review, despite the change in the legislation, because the relevant powers are those in effect when the Secretary of State made the application for review on 7 July 1998. The effect of section 12(8)(b) of the Social Security Act 1998 is that the new appeal tribunal cannot take into account circumstances not obtaining on 25 August 1998. However, if it takes the view that the award of the middle rate care component for life should be reviewed and replaced by the lower rate or by the middle rate for a limited period, then the new appeal tribunal needs to consider the appropriate period of the award. I do not need to give any directions of law about the conditions of entitlement to the care component.

21. The situation in relation to the mobility component is

rather more complicated. There must first be an investigation by the Secretary of State into the question of whether the award of mobility allowance to which the claimant was entitled on 6 April 1992 was for the period ending on the day before her 80th birthday or for a more limited period (eg down to 8 July 1995). Only on the first alternative could the claimant be treated under the terms of regulation 8(1) of the Social Security (Introduction of Disability Living Allowance) Regulations 1991 ("the Introduction of DLA Regulations") as having been awarded the mobility component of DLA for life on the termination of the award of mobility allowance on 5 April 1992 in accordance with regulation 7. If the award of mobility allowance was for the period down to 8 July 1995 then, under regulation 8(1)(a), the deemed award of the mobility component of DLA had to end on the same date. The deeming under regulation 8(1) seems to have operated automatically, without any decision by an adjudication officer. Therefore, if the deemed award of the mobility component of DLA could not properly extend beyond 8 July 1995, then, in the absence of some further decision awarding the mobility component, the claimant was not entitled to it after that date. The question of whether there has been any such award must also be investigated by the Secretary of State. The results of the investigations (with supporting documentary evidence wherever possible) are to form part of the written submissions on the rehearing.

22. If the answer is that the claimant properly had either a deemed or an actual award of the mobility component of DLA from some date for life, then the new appeal tribunal must proceed as directed in paragraphs 24 to 28 below.

23. If the answer is that the claimant had an award of the mobility component of DLA for some limited period, then the new appeal tribunal must proceed as follows. There would be no question of removing an entitlement on review. However, the new appeal tribunal would have before it the Secretary of State's application for review made on 7 July 1998. That application was properly directed against the adjudication officer's decision dated 26 June 1992. Although that decision only made an award of the care component, it was a decision about the single benefit of DLA. The application accordingly relates to DLA as a whole. I do not think that it is necessary to explore whether accepting a ground of review of the care component opens up possible revision to include the mobility component (although my view is that it does). It is simplest to say that the expiry of the fixed award of the mobility component was a relevant change of circumstances in relation to the adjudication officer's decision of 26 June 1992, so that there are grounds to review that decision. Something along those lines must have been envisaged for "renewal claims" for one component where there was continuing entitlement to the other component to have been treated as applications for review, in

accordance with the system under the Social Security Administration Act 1992. As there is evidence suggesting a continuing satisfaction of the conditions of entitlement to mobility component, the new appeal tribunal should consider whether there should be revision from some date after the expiry of the fixed-term award of the mobility component so as to award the component again. Since the question will be whether the existing entitlement should be altered in favour of the claimant, the burden of proof will be on her. There might be difficult technical questions of the date on which any revision could take effect under regulation 59 of the Social Security (Adjudication) Regulations 1986, but those are unlikely to have practical significance. I assume that the claimant was paid the mobility component, probably down to 17 February 1999 and that there is no question of seeking recovery of any of that benefit.

24. If the answer following the investigation required by paragraph 21 above is that the claimant had an award of the higher rate of the mobility component for life as at 7 July 1998, the new appeal tribunal must proceed as follows. It must first consider, before taking any oral evidence and ignoring the evidence given by the claimant at the DAT hearing on 17 February 1999, the prohibition in section 33(6) of the Social Security Administration Act 1992 is lifted by virtue of section 33(6)(ii). The new appeal tribunal may look at other evidence legitimately before it at the beginning of the rehearing, and may hear submissions about the operation of section 33(6). Some of the points made in the claimant's representative's submission of 20 November 2000 may be relevant at that point. I do not wish to give any specific directions, but direct the new appeal tribunal to what was said by the Court of Appeal in Ashraf, especially in relation to cases where grounds for review under section 30(2) are in issue.

25. I direct the new appeal tribunal that section 33(6) is relevant despite the repeal of the adjudication provisions in the Social Security Administration Act 1992 with effect, in relation to DLA, from 18 October 1999. The legislation currently in force, the Social Security Act 1998 and the Social Security and Child Support (Decisions and Appeals) Regulations 1999, contains no comparable protection for life awards of one component where an appeal expressly raises only the other component. Under section 12(8)(a) of the Social Security Act 1998 an appeal tribunal "need not consider any issue that is not raised by the appeal". The consideration of other issues is thus not prohibited, although of course the principles of natural justice will impose some controls. Normally legislative provisions to do with procedure will affect proceedings from the date on which they come into force. And the claimant's appeal is, by virtue of paragraph 6 of Schedule 16 to the Social Security Act 1998 (Commencement No 11, and Savings and Consequential and Transitional Provisions Order 1999, deemed to

be an appeal against a Secretary of State's decision under section 8 of the 1998 Act to an appeal tribunal constituted under the 1998 Act.

26. However, the protection of section 33(6) of the Social Security Administration Act 1992 is not a mere matter of procedure. The new appeal tribunal would be looking at a question of review, by reference to the legislative powers in existence as at 7 July 1998, and is restricted to taking into account circumstances obtaining down to 25 August 1998 (section 12(8)(b) of the Social Security Act 1998). In my judgment, the provisions in sections 30 to 35 of the Social Security Administration Act 1992 formed a coherent package relating to reviews of decisions on DLA and subsequent appeals. Where review under section 30 is in issue, the substantive protections of section 32(4) and, on appeal, section 33(6), must also operate. If it is necessary for me to do so, I conclude that the claimant had an accrued right to the protection of section 33(6), in relation to the period in issue on the appeal, under section 16(1)(c) of the Interpretation Act 1978 which was not affected by the repeal of the relevant parts of the Social Security Administration Act 1992. I have not had any specific submissions on this question, but note that in the submission dated 14 September 2000 the Secretary of State's representative accepted my suggestion in a direction that section 33(6) would be relevant to a rehearing carried out by an appeal tribunal and the claimant's representative's submissions in reply were on the same basis.

27. If the new appeal tribunal concludes that the prohibition in section 33(6) is not lifted, that will be the end of the case so far as the mobility component is concerned. The life award will remain operative. It will then be for the Secretary of State to consider whether to exercise any of the powers of revision or supersession under the Social Security Act 1998.

28. If the new appeal tribunal concludes that the prohibition in section 33(6) is lifted, then it must go on to consider whether the Secretary of State has shown a ground of review relating to the mobility component under section 30(2) and, if so, that the revised decision should be adverse to the claimant. In the course of that consideration it may take evidence in person from claimant, as well of course as looking at other evidence put forward, bearing in mind the period to which the evidence must be relevant under section 12(8)(b) of the Social Security Act 1998. The new appeal tribunal must also consider the date from which any revised decision is effective, and carefully record its conclusions. Once again, I do not need to give any directions of law on the conditions of entitlement to the mobility component.

(Signed) J Mesher
Commissioner

Date: 5 February 2001