Bulk 176
(SHEET)

THE SOCIAL SECURITY COMMISSIONERS

Commissioner's Case No: CSA/248/02

SOCIAL SECURITY ACT 1998

APPEAL FROM THE APPEAL TRIBUNAL UPON A QUESTION OF LAW

COMMISSIONER: D J MAY QC

DECISION OF SOCIAL SECURITY COMMISSIONER

1. My decision is that the decision of the tribunal given at Glasgow on 14 December 2001 is not erroneous upon a point of law. The appeal fails. I dismiss it.

2. This case came before me for an oral hearing on 12 November 2002. In the course of the hearing, for reasons which will become apparent, Mr Brodie asked me for an adjournment. I granted this and the hearing was resumed on 18 December 2002. The claimant was represented by Mr Orr, a Welfare Rights Officer with Glasgow City Council. The Secretary of State was represented by Mr Brodie, Advocate instructed by Mr Crilley, Solicitor of the Office of the Solicitor to the Advocate General.

3. In this case, the claimant had an award of attendance allowance expiring on 4 June 2001. She made a renewal claim for attendance allowance on 29 January 2001. An adverse decision was made in respect of that claim on 3 March 2001. Subsequently the claimant sought a revisal of her existing award. However parties before me indicated that that was not a matter which was before the tribunal. The appeal before the tribunal related to the adverse decision of 3 March 2001. The appeal before the tribunal was unsuccessful in respect that they found that the claimant was not entitled to attendance allowance from 5 June 2001. The claimant appealed against that decision. Mr Orr indicated that he was not insisting upon the grounds of appeal submitted which are set out at page 98. In addition he indicated that he was not insisting on the further submission made by him in writing at page 148.

4. The substance of the appeal arose out of the support given to it by the Secretary of State.

5. Amongst the issues before the tribunal was that of the day time supervision condition of the allowance. The tribunal made the following finding in fact:-

> "4 the appellant fell in May 2001 fracturing her wrist. The tribunal is restricted to considering conditions down to date of decision, in this case March 2001. Apart from the fall which occurred in March 1999 when she fractured her hip there have been no other falls."

They also found:-

> "7. The appellant suffers from dizzy spells which are undiagnosed but which she considers might be caused by her medication. There have been no falls nor injury as a result of these."

In giving reasons for their decision they said:

> "We were not persuaded that on the balance of probabilities, there was a significant risk of substantial danger in the absence of supervision. In her claim pack she did not indicate any problem with falls and this was confirmed in the appellant's own evidence to the tribunal. The fall which had resulted in her fractured hip in 1999 had been caused by a faulty pavement slab. She had no other recorded falls until may *[sic]* 2001 and the tribunal considered that her continued use of a walking stick or elbow crutch had to be taken into account. The tribunal is restricted to considering

circumstances down to the date of decision and the injury to the wrist in May 2001 is outwith that period. We cannot accept that there is a non-remote risk of substantial danger such that she requires continual supervision throughout the day to avoid that danger. Although there was mention of dizzy turns the appellant was vague when asked about this and the tribunal could not accept that this would give rise to the need for continual supervision."

6. What was put before the tribunal in relation to supervision is recorded in the record of proceedings. It is said therein:-

> "Lower rate AA – help with bodily function or supervision. Problem in falls is continuing. Has had another fall in July – fractured wrist. Unsteady all the time."

And then:-

> "Can have dizzy spells – no reason for this – could be medication. Falls – indicated in Claim Pack no falls."

And then:-

> "Last fall – May 01 – fractured wrist."

The claimant's representative is recorded as having said:-

> "Rep – Risk of falls – dizziness."

7. It was Mr Brodie's submission that the tribunal erred in law by failing to have regard to the evidence of the fall in May 2001 when the claimant broke her wrist. This submission was made in the context of the statutory prohibition contained in section 12(8)(b) of the Social Security Act 1998 where it is provided that:-

> "12(8) In deciding an appeal under this section an appeal tribunal –
> (a).....; and
> (b) shall not take into account any circumstances not obtaining at the time when the decision appealed against was made."

Mr Brodie initially referred me to a decision of Mr Commissioner Turnbull in CDLA/3848/2001. Under reference to regulation 13C of the Social Security (Claims and Payments) Regulations 1987 provides, Mr Commissioner Turnbull said, having regard to these provisions:-

> Reg 13C: "(1) A person entitled to claim an award of disability living allowance may make a further claim for disability living allowance during the period of 6 months immediately before the existing award expires.
>
> (2) Where a person makes a claim in accordane*[sic]* with paragraph (1) the Secretary of State may –
> (a) treat the claim as if made on the first day after the expiry of the existing award ("the renewal date"); and

(b) award benefit accordingly, subject to the condition that the person satisfies the requirements for entitlement on the renewal date

(3) A decision pursuant to paragraph 2(b) to award benefit may be revised under section 9 of the Social Security Act 1998 if the requirements for entitlement are found not to have been satisfied on the renewal date."

"14. In my judgment it is implicit in Reg. 13C of the 1987 Regulations that circumstances occurring between the date of a decision on a renewal claim and the renewal date can (and therefore must) be taken into account by an appeal tribunal."

He went on to say:-

"(2) Reg 13C(2), having stated that the Secretary of State may treat the claim as if made on the renewal date, goes on to provide that he may "award benefit accordingly." That means that the task of a decision maker (and appeal tribunal on appeal) is to determine whether the conditions for disability living allowance will be (or were) satisfied on the renewal date. It is in my view implicit that circumstances which occur between the date of the decision maker's decision and the renewal date can be taken into account by an appeal tribunal. It cannot have been the intention of s.12(8)(b) and Reg 13C, read together, that an appeal tribunal is prevented from taking into account changes in circumstances relevant to the very issue which it has to decide. If it were to ignore such changes, the effect of its decision would not be to "award benefit accordingly" (i.e. on the basis of a claim treated as made on the renewal date)."

8. Whilst I am persuaded that Mr Commissioner Turnbull's reasoning in paragraph 14 of his decision is correct, Mr Brodie accepted that the difficulty for him with this line of argument was that regulation 13C was restricted to awards of disability living allowance only. Attendance allowance which is a separate benefit was not included within the compass of the statutory conditions contained in regulation 13C. Neither party was able to direct me to any regulation of a similar nature relating to attendance allowance, though as will be seen there is a somewhat different statutory provision, namely section 65(6) of the Social Security Contributions and Benefits Act 1992 which according to Mr Brodie provides that a claim can be made during the subsistence of an existing award. It is not clear to me and neither party was able to enlighten me why there is or ought to be any distinction in the operation of renewal claims of disability living allowance and attendance allowance.

9. In the event there was one further and more fundamental problem and that is whether by virtue of the terms of regulation 13C are concerned with its restriction to disability living allowance, such a renewal claim as was made in this case could competently have been made.

10. Section 65(6) of the Social Security Contributions and Benefits Act 1992 provides:-

"(6) Except insofar as regulations otherwise provide and subject to section 66(1) below –

(a) a claim for attendance allowance may be made during the period of six months immediately preceding the period for which the person to whom the claim relates is entitled to the allowance;

and

(b) an award may be made in pursuance of a claim so made, subject to the condition that, throughout that period of six months, that person satisfies –

(i) both the day and night attendance conditions, or
(ii) if the award is at the lower rate, one of those conditions."

Mr Brodie submitted that the words "is entitled to the allowance" does not mean the existing award in a case where a claim is made during the currency of that award.

That was not disputed by Mr Orr.

11. It was Mr Brodie's submission that it was competent to make and decide a claim for attendance allowance prior to the expiry of an existing award of that allowance, despite the fact that no provision akin to regulation 13C of the claims and payments regulations relating to disability living allowance had been identified. In making that submission he noted that regulation 4 of Social Security (Attendance Allowance) Regulations 1991 had been revoked. That regulation had allowed for an allowance to be payable before the date of claim in renewal cases. He speculated that the reason for revocation may have been the fact that it was not necessary because of the content of section 65(6).

12. It was Mr Brodie's submission that the thrust of section 65(6) was to entitle a claimant to make a claim within the six month period prior to entitlement to the allowance. It was his submission that the operation of this section can work in either of the following situations. First where there has been no claim for attendance allowance previously. Someone suffering from disablement may make a claim during the six month qualifying period. However such a person would not be entitled to the allowance until the six month qualifying period has elapsed because of the provisions of section 65(1). Entitlement arises on the day that the six month period has been satisfied though section 65(6)(a) allows a claimant to claim before entitlement. Section 65(6)(b) allows award to be made but only after the expiry of the six month qualifying period. Secondly, Mr Brodie submitted that where there was an existing limited award due to expire on a particular date, the claimant was not entitled to a second award of attendance allowance for the same period or for part of the same period. Nonetheless he submitted that by virtue of the provisions of section 65(6) allowing claims to be made prior to entitlement, the claimant was entitled to make a claim prior to the expiry of the existing award and that an award could be made in pursuance of that claim provided that the statutory conditions had been met but only from the date of expiry of the existing award.

13. For myself I can see the logic of Mr Brodie's position in respect that it would enable where there is a successful renewal claim for attendance allowance to be payable from the day after the expiry of the existing award, which may not be the case otherwise having regard to the revocation of regulation 4 of the Attendance Allowance Regulations and the absence of any provision similar to regulation 13C of the Claims and Payments Regulations in respect of disability living allowance. Mr Orr did not seek to contradict Mr Brodie's submission on this issue and accepted it. Thus I accept Mr Brodie's concession that the renewal claim could competently be made.

14. It was accepted by Mr Brodie that in this case, as far as the decision appealed against to the tribunal was concerned, whilst the claim was competently made, it was unsuccessful because the claimant failed on two bases. The first being that the statutory conditions for the allowance on the date of renewal were not met and secondly the six month qualifying period prior to that date was not met.

15. Mr Brodie then submitted that the tribunal erred in law by virtue of a failure on their part to have regard and take into account in applying the test, finding in fact 4 in relation to the claimant's fall in May 2001 in which she fractured her wrist. The thrust of his submission was that the exercise being carried out under section 65(6) was the same exercise as was carried out under regulation 13C(2) in relation to disability living allowance. Thus the effect was the same as that identified by Mr Commissioner Turnbull in CDLA/3848/2000.

16. Mr Orr did not dissent from that submission and accepted it.

17. The difficulty I have with Mr Brodie's submission is that the logic of Mr Commissioner Turnbull's decision in relation to the statutory provisions he was dealing with was that the claim was to be treated as if made on the renewal date and that the Secretary of State "may award benefit accordingly". Thus the treating provision does not subvert the operation of section 12(8)(b) of the Act. Section 12(8)(b) of the Act was intended to introduce simplicity into the decision making process and cannot simply be subverted. There is no question in this case of the claim being made on any date other than it was There was no statutory provision cited to me for having it treated as having been made on any other date.

18. In giving his reasons for his decision, Mr Commissioner Turnbull set out the provision of section 8(2) of the Social Security Act 1998 which provides:-

> s.8(2): "Where at any time a claim for a relevant benefit is decided by the Secretary of State –
> (a) the claim shall not be regarded as subsisting after that time; and
> (b) accordingly, the claimant shall not (without making a further claim) be entitled to the benefit on the basis of circumstances not obtaining at that time."

Mr Commissioner Turnbull then went on to say in a passage already quoted above:-

> "14 In my judgment it is implicit in Reg. 13C of the 1987 Regulations that circumstances occurring between the date of a decision on a renewal claim and the renewal date can (and therefore must) be taken into account by an appeal tribunal. My reasons are these:"

Included in his reasons he said:-

> "(c) Where, under Reg. 13C(2)(a), the claim is treated as if made on the renewal date, what appears to have been the rationale behind s.12(8)(b) is removed.
>
> (d) Reg. 13C(2)(a) is on the face of it a somewhat strange provision, as it appears to envisage a decision being made before the date on which the claim is treated as

being made. The explanation for the introduction (by an amendment to the 1987 Regulations made in 1992) of that somewhat strange concept may have been the desire to avoid the effect of s.20(12) of the Social Security Administration Act 1992. That provided that, where a claim for a disability living allowance in respect of a person already awarded such an allowance was made or treated as made during the period for which he had been awarded such an allowance, it was required to be treated as an application for a review. But whatever the precise reason for s.13C(2)(a), its language is clear.

(e) S.12(8)(b) of the 1998 Act follows logically from s.8(2) of that Act. The old down to the date of hearing rule for appeal tribunals, as analysed by the tribunal of Commissioners in R(S) 2/98, was based on the continued existence of the claim. If the claim does not continue to exist after a decision on it, the basis for the down to the date of hearing rule is undermined: see R(DLA) 3/01 at paras. 20 to 24.

(f) However, where on a renewal claim the claim is not treated as made until the renewal date, s.8(2) cannot apply – the claim is expressly treated as subsisting after the date of the decision on it. S.12(8)(b) is therefore inappropriate."

19. These considerations do not apply in the instant case. While I accept what Mr Brodie says in relation to the decision maker having to make a decision in the context of the renewal date the claim does not continue to exist though an award may be made for a date after the date of the decision. I do not consider the exercise carried out by the decision maker in the instant case was the same as that which would be carried out in a disability living allowance case. For while a decision requires to be made with reference to a future date, namely the renewal date and the qualifying period is counted back from that date, that is not at all the same thing as treating the claim having been made at a future date. Thus it seems to me that section 12(8)(b) does have application in the instant case. Thus I conclude that the tribunal did not err in law in reaching the decision which they did.

20. Mr Brodie had earlier presented an argument to seek to persuade me that the tribunal in any event erred in law for other reasons by failing to consider the evidence of the fall resulting in the broken wrist in May 2001. In doing so he made a distinction between the fact that this was a renewal claim as opposed to a fresh claim. It was his position that if the renewal claim had been a fresh claim, then the statutory bar contained in section 12(8)(b) of the Social Security Act 1998 would have prevented the tribunal from considering the evidence of the broken wrist in May 2001. However it was his position that as the award, if one were to be made, was one which was for commencement subsequent to the fall, then this could be taken into account notwithstanding section 12(8)(b) because the fall in May 2001 was an adminicle of evidence in respect of what the circumstances were which obtained at the time the decision was made. It was his position that, when the decision maker made his decision, he was doing so upon an assessment of risk in relation to falls which was based on incomplete evidence. He submitted that he had support for this approach in the decision of Mr Commissioner Jacobs in CIS/4734/99. In a lengthy decision, Mr Commissioner Jacobs at paragraph 55 in that decision said:-

"55. It refers to "any circumstances not obtaining at the time when the decision appealed against was made." It is not refer *[sic]* to circumstances "not existing" at that time. The Secretary of State and the Appeal Tribunal will usually be concerned not with the entitlement at a particular date, but over a period. That period will run

> from the date of claim to the date when a decision is made on behalf of the Secretary of State. There will almost always be a delay before a decision is made on a claim. That delay may be lengthy while the Secretary of State makes inquiries and gathers evidence. There may be changes of circumstances within that period. In this context, a circumstance must be "obtaining at the time when the decision appealed against was made" if it existed at any time during that period. Otherwise, the Secretary of State and the Appeal Tribunal would not be able to take account of circumstances as at the date of claim if they had changed before the decision was made. Section 12(8)(b) only applies to fresh circumstances occurring after the decision is made. This is more likely to be relevant to benefits with daily entitlement, like Income Support or Jobseeker's Allowance, than to benefits in which entitlement is considered over a period, like Disability Living Allowance."

In that decision a Commissioner sought to explain what he had in mind at paragraphs 61 to 68. The test to these arguments is first, the evidence of risk which arose as a result of the claimant having fallen was not a circumstance which obtained at the time of the decision being made by the decision maker. If the risk had been assessed at March 2001 the elements in assessing that risk were not the same as at May 2001. It is more than just an adminicle of evidence in respect of the problem of balance as submitted by Mr Brodie. Secondly it is difficult to understand Mr Brodie's distinction as to why the argument would not work with a fresh claim in respect that on his analysis the adminicle of evidence would remain the same and the decision would have been made on the same date.

21. Mr Brodie had submitted to me that in the event that I sustained an argument that the tribunal erred in law I should set the tribunal decision aside and make the decision that they ought to have made which would have been to the same effect. Whilst it was his position they should not have excluded a consideration of the fall in May 2001 the result would have been the same upon the basis that the claimant would not have satisfied the qualifying period for the allowance. Mr Orr on the other hand submitted that I should have remitted the case to a freshly constituted tribunal on the basis that the fall in May 2001 was material to the risk of falling which was an issue which the tribunal had to determine both in relation to the qualifying period and whether the conditions for the allowance were satisfied. If I had been with Mr Brodie on either of his arguments that the tribunal erred in law I would have been inclined to have adopted the course suggested by him by virtue of the analysis of the position I made in paragraph 20.

21. The appeal fails.

(signed)
D J MAY QC
Commissioner
Date: 24 December 2002