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Judgment: approved by the Court for handing down | *Delivered:* **13/04/2005**
(subject to editorial corrections)

IN THE HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ANNE MONGAN

Appellant

-v-

DEPARTMENT FOR SOCIAL DEVELOPMENT

Respondent

Before Kerr LCJ, Gillen J and Weatherup J

KERR LCJ

Introduction

[1] This is an appeal by way of case stated from a decision of the Social Security Commissioner. The Commissioner had dismissed the appellant's appeal against the rejection by an appeal tribunal of her appeal from the decision of the Social Security Agency of her application for disability living allowance (DLA). As is conventional, the case stated poses a number of questions seeking the opinion of this court as to whether the Commissioner was correct in law in making certain findings. The findings that the Commissioner made may be summarised as follows:

> (i) deciding that the tribunal was entitled to conclude that the entitlement to the lower rate of the mobility component of DLA was not an issue on the appeal before it;
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> (ii) deciding that it was the tribunal's duty to deal with an issue if it was explicitly raised on appeal or apparent from the evidence, though not raised by any professional representative, and deciding

that the tribunal had performed that duty in this instance;

(iii) deciding that the conditions of entitlement for lower rate mobility component and the higher rate of that component do not overlap;

(iv) reaching the conclusion that even if a claim for lower rate had been presented to the tribunal, an award could not have been made in respect thereof;

(v) concluding that the evidence before the tribunal, taken as a whole, did not raise even the possibility of entitlement to the lower rate component.

General background

[2] DLA is a non-contributory benefit paid to persons who are so severely disabled that they need assistance to lead a normal life, or are so severely disabled that they are unable or virtually unable to walk. The benefit has two components – the care component and the mobility component. For both components there is a qualifying period of three months and the disability must be one that is likely to continue for at least six months.

[3] On 28 July 1999 the appellant applied to the Social Security Agency for DLA. She claimed that she suffered from arthritis and severe asthma which caused breathlessness; that she was unable to walk very far without severe discomfort; and that she often became light-headed and needed to be accompanied when outdoors. She stated that on some occasions she would fall, and that if she fell she required help to get up. Her application was refused. She wrote to the agency on 27 September 1999 seeking a review of this decision, stating that she felt she should have been awarded some 'care component and mobility'. She referred to her severe asthma and arthritis in her legs. She again claimed that she required help to get around. By letter dated 30 January 2000, the Social Security Agency refused the application for a review.

[4] The appellant appealed. The appeal tribunal after hearing submissions dismissed the appeal on 20 September 2000. In respect of the mobility component, the tribunal considered that while appellant's asthma would restrict her ability to walk to some extent, she was unquestionably able to walk for a reasonable distance, in a reasonable manner, and for a reasonable period. On the basis of the medical report provided, the tribunal concluded that the appellant had no difficulty with her back or lower limb function, no

impairment of gait or balance, and no documented history of falls. They rejected the argument that walking could cause deterioration in her health, concluding that her asthma was not so severe as to be likely to cause any decline in her overall condition. They noted that no medical evidence had been presented that supported the claim that there would be any general worsening of the appellant's health. They also recorded that "no claim was presented in relation to the lower rate mobility component."

[5] Leave was granted to seek judicial review of the decision of the appeal tribunal. After agreement between the parties that the Social Security Commissioner would consider the appellant's claim, the application for judicial review did not proceed. At the hearing before the Commissioner the appellant argued that it was implicit in the tribunal's decision that it would have allowed DLA at the lower rate for the mobility component if this had been expressly claimed. While not conceding that a claim for the lower rate had not been explicitly made, the appellant submitted to the Commissioner that the tribunal should have considered the lower rate even if it had not been expressly raised.

[6] The Commissioner dismissed the appeal. She held that no claim for the lower rate of DLA had been expressly raised before the tribunal. Not only on that account but also because of the manner in which the appeal was presented to it, the Commissioner decided that the tribunal was entitled to conclude that the appellant had elected not to claim the lower rate. She took the view that entitlement to the lower and higher rates did not overlap, and that where one rate was claimed there was no automatic requirement to consider the other. She also found that there was no general practice whereby tribunals considered issues that had not been expressly raised. She accepted, however, that where an issue was apparent from the evidence (although not specifically adverted to by an appellant), the tribunal would have to deal with it. But in the present case the evidence presented to the tribunal did not raise a possibility of entitlement that needed to be explored. Finally, the Commissioner considered that, even if the tribunal had looked at the issue of the lower rate, on the basis of the evidence available, no award would have been made in any event.

Statutory Background

[7] The Social Security Contributions and Benefits (Northern Ireland) Act 1992 provides for payment of DLA. Section 71 deals with the two components of care and mobility, which we have referred to above. This appeal concerns the mobility component. Section 73 sets out the criteria for entitlement to this component. The material provisions are: -

> **"73.**—(1) Subject to the provisions of this Act, a person shall be entitled to the mobility component

> of a disability living allowance for any period in which he is over the age of 5 and throughout which—
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> > (a) he is suffering from physical disablement such that he is either unable to walk or virtually unable to do so;
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> > (b) he falls within subsection (2) below;
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> > (c) he falls within subsection (3) below; or
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> > (d) he is able to walk but is so severely disabled physically or mentally that, disregarding any ability he may have to use routes which are familiar to him on his own, he cannot take advantage of the faculty out of doors without guidance or supervision from another person most of the time.

[8] The background to the enactment of section 73 (1) (d) is provided by the decision in *Lees v. Secretary of State for Social Services* [1985] 1 AC 930. That case concerned a woman who was blind and suffered problems with her balance. She applied for the predecessor of the mobility component. While she was clearly unable to walk from one place to another unassisted, she was physically able to walk. The House of Lords considered that she could not be described as being virtually unable to walk, and thus did not come within subsection (a). It would appear that subsection (d) was subsequently introduced to correct what might otherwise have been regarded as an anomaly and to allow benefit to be awarded to those who were physically able to walk, but unable to take advantage of this faculty because of their disability.

[9] Section 73 (10) provides that two weekly rates of the mobility component shall be prescribed. By virtue of section 73 (11) the higher rate is payable if the person is entitled by virtue of subsection (1) (a), (b), or (c), and a lower rate in any other case – in effect, a person who qualifies under subsection (1) (d).

[10] An appeal to the appeals tribunal is governed by the Social Security (Northern Ireland) Order 1998, article 13 (8) (a) of which provides: -

> "(8) In deciding an appeal under this Article, an appeal tribunal—

> (a) need not consider any issue that is not raised by the appeal; and
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> (b) shall not take into account any circumstances not obtaining at the time when the decision appealed against was made."

The appeal

[11] The question whether there is an element of overlap, or indeed a gap, between the criteria for the lower and higher rates is no longer an issue in this case. It had been argued by the appellant before the Commissioner that the lower and higher rate are on a continuum, with an element of overlap in the criteria to be met, and that consequently failure to reach the threshold for the higher rate would lead inexorably to consideration of eligibility for the lower rate. Before this court, however, it was accepted by the appellant that the tribunal was not automatically required to consider the lower rate in every case where the higher rate was refused.

[12] On the appeal the principal thrust of the appellant's case was that the issue of the lower rate, if not explicitly referred to before the tribunal, was clearly apparent from the evidence submitted to it. It was argued that the tribunal's inquisitorial function clearly comprehended a duty to consider entitlement to the lower rate, even if that had not been expressly articulated as an alternative basis for the award of benefit to her application for the higher rate mobility component. On this issue Mr O'Hara QC, counsel for the appellant drew attention to the fact that the tribunal had dealt with the appellant's possible entitlement to the lower rate of the care component, even though the middle rate had been claimed. The Commissioner, in her decision acknowledged that a different approach had been taken by the tribunal to the care component application but she suggested that the care component was structured differently from the mobility component. It more readily required consideration of the possibility of a lower rate award where the higher rate was refused than did the mobility component.

[13] Mr McAlister for the respondent suggested that not only had the issue of the lower rate not been expressly raised before the tribunal but there was no evidence before it that could be regarded as sufficient to require it to be considered. Indeed, the evidence did not even establish a prima facie case of entitlement at the lower rate. Alternatively, he suggested that if the issue had been implicitly raised, the tribunal had considered the matter and had determined that the evidence did not support the claim or warrant further exploration. It was submitted that this was enough to discharge any duty on the tribunal.

The role of the tribunal

[14] The terms of article 13 (8) (a) of the 1998 Order make it clear that issues not raised by an appeal need not be considered by an appeal tribunal. The use of the phrase "raised *by* the appeal" should be noted. The use of these words would tend to suggest that the tribunal would not be absolved of the duty to consider relevant issues simply because they have been neglected by the appellant or her legal representatives and that it has a role to identify what issues are at stake on the appeal even if they have not been clearly or expressly articulated by the appellant. Such an approach would chime well with the inquisitorial nature of the proceedings before the tribunal.

[15] It is now well established that appeal tribunal proceedings are inquisitorial in nature – see, for example the recent *Decision of a Tribunal of Social Security Commissioners* CIB/4751/2002, CDLA 4753/2002, CDLA 4939/2002 and CDLA 514/2002. Mr McAlister relied on this decision, however, to support his contention that the tribunal was not required to consider matters that had not been raised by the parties to the proceedings. In that case it was held that 'raised by the appeal' should be interpreted to mean "actually raised at or before the hearing by one of the parties." In so far as the decision suggests that an appeal tribunal would not be competent to inquire into a matter that arose on an appeal simply because it was not expressly argued by one of the parties to the appeal, we could not agree with it. It appears to us that the plain meaning of the words of the statute, taken together with the inquisitorial nature of the appeal hearing, demand a more proactive approach. If, for instance, it appeared to the tribunal from the evidence presented to it that an appellant might be entitled to a lower level of benefit than that claimed, its inquisitorial role would require a proper investigation of that possible entitlement.

[16] Mr McAlister suggested that even if the tribunal had a duty to consider issues not explicitly raised, this was a limited responsibility and he referred to an unreported decision C5/03-04 (IB) in which Commissioner Brown held that the tribunal was not required "to exhaustively trawl the evidence to see if there is any remote possibility of an issue being raised by it." We accept that there must be limits to the tribunal's responsibility to identify and examine issues that have not been expressly raised and we agree with the observation of Commissioner Brown. But as she said in a later passage in the same case, issues "clearly apparent from the evidence" must be considered.

[17] Whether an issue is sufficiently apparent from the evidence will depend on the particular circumstances of each case. Likewise, the question of how far the tribunal must go in exploring such an issue will depend on the specific facts of the case. The more obviously relevant an issue, the greater will be the need to investigate it. An extensive inquiry into the issue will not invariably be required. Indeed, a perfunctory examination of the issue may often suffice.

It appears to us, however, that where a higher rate of benefit is claimed and the facts presented to the tribunal suggest that an appellant might well be entitled to a lower rate, it will normally be necessary to examine that issue, whether or not it has been raised by the appellant or her legal representatives.

[18] In carrying out their inquisitorial function, the tribunal should have regard to whether the party has the benefit of legal representation. It need hardly be said that close attention should be paid to the possibility that relevant issues might be overlooked where the appellant does not have legal representation. Where an appellant is legally represented the tribunal is entitled to look to the legal representatives for elucidation of the issues that arise. But this does not relieve them of the obligation to enquire into potentially relevant matters. A poorly represented party should not be placed at any greater disadvantage than an unrepresented party.

The conduct of the proceedings before the tribunal

[19] Before considering whether the evidence before the tribunal gave rise to the need to investigate the appellant's possible entitlement to the lower rate, it is necessary to look briefly at what is covered by section 73 (1) (d). The subsection clearly presupposes some ability to walk and that the claimant may be able to cope with familiar routes. Mr O'Hara suggested that there was no need to read in words of qualification when interpreting the words 'cannot take advantage of' when assessing the level of difficulty experienced by a claimant in using such ability as he has in walking out of doors. A common sense approach was sufficient – see, for instance, *R (DLA) 4/01* and *CDLA/042/94*. The respondent did not challenge this position and we are disposed to accept it. The circumstances in which an individual may be able to walk to some extent and to experience no difficulty with familiar routes but to otherwise need assistance are manifold, but there should not be undue difficulty in assessing whether the criteria necessary to engage paragraph (d) of section 73 (1) are fulfilled. There must be some ability to walk but the claimant must require some supervision or guidance on unfamiliar routes at least. That supervision or guidance must be necessary as a result of the claimant's physical or mental disability.

[20] The type of 'supervision and guidance' required will depend on the nature of the disability in question, but in general this will involve monitoring of the claimant by a person capable of intervening to assist where necessary. Plainly, it entails more than mere accompaniment and reassurance of the claimant. Mr McAlister drew our attention to two cases on the nature of the supervision or guidance that is contemplated by the provision – *CDLA/42/94* and *CDLA/2643/98*. These two cases differed as to whether a claimant had to show that assistance and supervision would overcome the disability to some extent. The subsequent case *CSDLA/12/03* heralds an emerging consensus that the guidance or supervision must enhance the claimant's ability to take

advantage of their capacity for walking. This seems to us to be appropriate. The basis on which this particular species of benefit is payable is that the claimant has some limited ability to walk and the benefit is designed to allow him to exploit that ability by having someone present to assist. If the presence of that person failed to increase the claimant's capability it would be somewhat pointless. The final aspect of eligibility for the benefit that should be noted is that the supervision and guidance from another person should be required for 'most of the time'.

[21] Two differing accounts of the manner in which the proceedings were conducted before the tribunal were presented to the Commissioner. In her affidavit Mrs. Cooper, the legally qualified chairman of the tribunal, stated that no arguments were presented on the appellant's behalf regarding the lower rate component. She said that it was her invariable practice to inquire at the beginning of the hearing as to which elements of the particular benefit in question are being sought. In this case, according to Mrs Cooper, the appellant's solicitor indicated that the only claim was in respect of the higher rate of mobility allowance. The affidavit of Mrs. McBride, the appellant's solicitor, suggested that submissions were in fact made in respect of the lower rate.

[22] The Commissioner found on the balance of probabilities, that Mrs. Cooper's version was correct. We are satisfied that she was entitled to make this finding on the evidence presented to her, although it is perhaps worth observing that, regrettably, Mrs Cooper's affidavit is somewhat cryptic on the point. Some additional detail can be gleaned from the record of the tribunal proceedings. For reasons that will appear shortly, we do not consider that it is necessary to reach a resolution of the conflict between Mrs Cooper and Mrs McBride on this question. The essential issues in the case are (i) whether the arguments and evidence presented to the tribunal were such that it should have been alert to the need to investigate entitlement to lower rate benefit for the mobility component; (ii) if so, whether the tribunal in fact investigated the appellant's entitlement to that benefit; and, (iii) if it failed to do that, whether it can be said that if it had investigated that matter it was bound to have concluded that the appellant was not entitled to the benefit. If the evidence and arguments presented to the tribunal were sufficient to raise the possibility of entitlement to the lower rate, for the reasons we have given, we consider that the tribunal was obliged to consider this question, whether or not it was raised by the appellant. We have concluded that there was sufficient material before the tribunal to require it to do so. It follows that the dispute between Mrs Cooper and Mrs McBride on this issue is essentially academic.

[23] The reasons that we have concluded that there was sufficient material before the tribunal to prompt a full investigation of the appellant's possible entitlement under paragraph (d) of section 73 (1) are these. Her initial

application form, and the letters submitted by her when appealing the initial decisions were before the tribunal and formed part of the evidence that it was bound to consider. The application form, unfortunately perhaps, does not require a claimant to specify particular rates or components. Some of the questions seem to be designed to obtain evidence for particular requirements, however. The third page of section two of the form appears to be directed at the requirements for the higher rate, while the fourth page seems to be directed at those for the lower rate. On the fourth page of her form the appellant indicated that she is prone to light-headedness and that it is 'advisable to have someone with [her]'. Elsewhere in the form she stated that she fell occasionally and might need help to get up. The letters that she sent in relation to a review of the initial decision and intimating an appeal against it do not specify application for the higher rate of mobility benefit. These letters state that she 'need[s] help getting around'. On one view these statements strongly suggest the application was intended to include the lower rate. In any event, whatever may have been the intention of the appellant and her advisers, the statements are plainly inconsistent with entitlement to the higher rate as they suggest some ability to walk and this alone should have been sufficient to alert the tribunal to the need to examine possible eligibility for the lower rate.

[24] Mr McAlister referred to a number of points in the appellant's application form which, he suggested, would not have assisted in an application for the lower rate of benefit. In particular he mentioned that the appellant had indicated on the form that she had difficulties walking and that she needed to be given a lift in a car or to summon a taxi. He suggested that these statements would count against an application for the lower rate, as they suggest that supervision or guidance would not assist the appellant. This point was relevant, Mr McAlister claimed, both to the question whether the evidence submitted by the appellant warranted an investigation by the tribunal of possible entitlement to the lower rate and to the issue of whether it was inevitable that a lower rate claim was bound to fail in any event.

[25]We do not accept these arguments. In the first place the need for lifts and taxis is certainly relevant to the requirement that the appellant be unable to take advantage of her ability to walk without supervision and guidance. It ought to have prompted the need for further investigation by the appeal tribunal on that account alone. Secondly, we do not consider that the fact that the appellant takes taxis or obtains lifts precludes the possibility of a finding that she requires supervision and guidance most of the time in order to take advantage of her limited ability to walk. On proper investigation, of course, it may prove that these statements are not helpful to a claim for the lower rate mobility benefit but the question at this stage is not whether there was sufficient evidence to support a claim for the lower rate, simply whether there was enough evidence for it to be an issue. In our view the form submitted on behalf of the appellant contained a significant case for the lower rate mobility

component. It required to be fully investigated by the tribunal and it was far from certain that, on due investigation, it was bound to fail.

[26] We must now turn to the subsidiary argument of the respondent that the tribunal did in fact consider the possible eligibility of the appellant to the lower rate benefit but concluded, on reasonable grounds, that she was not entitled to it.

[27] If the tribunal had embarked on a proper investigation of this issue, one would have expected to see much clearer evidence of its having been considered. The tribunal's decision merely states that "no claim was presented in relation to the lower rate component." There is no reference to an examination of the question of whether the appellant sought supervision and guidance while out of doors; of who provided this; of how frequently it was required; of whether she was able to walk outside in unfamiliar territory if such guidance and supervision was available; or of whether she was able to manage on familiar routes. All these issues were, at least potentially, germane to the eligibility of the appellant to the lower rate of benefit. In the absence of inquiry on any of them, we are satisfied that no sufficient investigation of her entitlement to the lower rate of benefit was undertaken.

Conclusions

[28] We have concluded that the tribunal was not entitled to determine that the entitlement to the lower rate of the mobility component of DLA was not an issue on the appeal before it. We confirm that it was the tribunal's duty to deal with that issue since, if it was not explicitly raised on the appeal, it was certainly apparent from the evidence available to it.

[29] We express no opinion on the question whether the conditions of entitlement for lower rate mobility component and the higher rate of that component do not overlap. As we have recorded above, this was not an issue on the appeal. It may arise in future cases, however, and we would prefer to reserve any opinion on that issue after hearing full argument.

[30] For the reasons that we have given we consider that the Commissioner erred in law in deciding that even if a claim for lower rate had been presented to the tribunal, an award could not have been made in respect thereof and in concluding that the evidence before the tribunal, taken as a whole, did not give rise to the need to investigate entitlement to the lower rate component.

[31] We will therefore quash the decision of the Commissioner and allow the appeal of the appellant against the findings of the appeal tribunal. Her appeal against the refusal of DLA at the lower rate for the mobility component will require to be heard by a differently constituted appeal tribunal.