DB v Secretary of State for Work and Pensions (DLA)
[2016] UKUT 0205 (AAC)
CDLA/1121/2015

DECISION OF THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

Before: Upper Tribunal Judge Paula Gray

DECISION

This appeal by the claimant is dismissed.

Permission to appeal having been given by me on 29 April 2015 in accordance with the provisions of section 12(2)(b)(ii) of the Tribunals, Courts and Enforcement Act 2007 and rule 40(3) of the Tribunals Procedure (Upper Tribunal) Rules 2008 I do not set aside the decision of the First-tier Tribunal sitting at Fox Court and made on 28 November 2014 under reference SC 242/14/04704. It does not contain a material error of law, and it stands.

REASONS

Background

1. This appeal concerned only the appellant's entitlement to the mobility component of DLA. There was no dispute about entitlement to the care component.
2. I granted permission to appeal saying

> 3 In this case the FTT was dealing with a decision refusing to supersede an award of DLA to the appellant who had applied on 12 February 2014 for the higher rate of the mobility component based upon a change of circumstances. The FTT was of the view that, due to his current age the applicant was required to show that his entitlement to that component would have existed in 2004 prior to him turning 65. They saw this as the legal issue and their function as being to analyse the evidence with a view to establishing whether or not that was the case. They dismissed the appeal on the basis that it was unlikely that the appellant was virtually unable to walk at that stage.
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> 4 The appellant had chosen not to attend an oral hearing, citing his being "housebound" through disability as the reason. Contrary to the grounds of appeal the FTT did not explicitly accept that this was so; their comment, which is quoted rather out of context in the grounds of appeal, was to the effect that the applicant said he was housebound and therefore could not attend, and was not an assertion that this was in fact so.
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> 5 Nonetheless it seems to me that given what the FTT perceived as the critical issue in the case, and their view that contemporaneous documentary evidence would be more valuable than the oral evidence of the appellant as to his circumstances back in 2004, and given the limited amount of such evidence in the tribunal bundle, there is an argument that the tribunal should have considered adjourning for further oral evidence. I grant permission to appeal on that basis, but I do not shut down the argument put forward as to whether the FTT should have considered a domiciliary hearing to facilitate

the appellant's participation in the proceedings under rule 2 Tribunal Procedure (First Tier Tribunal) (SEC) Rules 2008 (the FTT procedural rules).

6 The Secretary of State shall make submissions as to the points raised and in respect of the appropriateness of a domiciliary hearing.

- Generally
- With regard to any implications as to a hearing generally being expected to be held in public (rule 30 (1), the FTT procedural rules)
- In this case and
- Whether, in relation to the exercise of the overriding objective, the FTT is able to consider public resources, either on a freestanding basis or in conjunction with the concept of proportionality
- Given that the appellant applied with the assistance of his then representative for a supersession of his previous award in 2013, and by decision made on a 7 October 2013 his award was increased to include highest rate care from 8 July 2013 but not the higher rate of the mobility component, and that decision does not seem to have been appealed, is there any principle of law that prevents the appellant effectively re-arguing the facts upon which that decision was based in the application for supersession which underlies this appeal.

Background matters

3. The appellant (or claimant) was born on 28/6/1939, becoming 65 on that date in 2004.
4. His initial DLA award was made from the date of claim 31/12/1998. It was for middle rate care and lower rate mobility. The lower rate of the mobility component was in payment because, in addition to the physical problems that have been the focus of this appeal the appellant has a psychiatric condition which would seem to have been the basis of the original awards made.

The first supersession application

5. The claimant contended for an increase in his award to include the higher rate of the mobility component in an application for supersession made on 24/7/2006. In the application form he dealt with his ability to walk outdoors and explained his walking difficulties due to joint pain. He said that he could at that time walk 60 metres or yards, that he would take about 10 minutes to accomplish that, and that the difficulties existed seven days a week.
6. Documents in the bundle before me (page 211, a screen print) show that the Secretary of State's decision maker refused the application; that decision was unsuccessfully appealed to the FTT, the appeal being concluded on 21/2/2007.

The second supersession application

7. An application to supersede that decision was made on 8/7/2013. This succeeded in part, resulting on 7/10/2013 in an increase in his middle rate care award to an award at the highest rate from the date of the application; however his lower rate mobility award was not increased.

This, the third supersession application

8. The claimant made a yet further supersession application on 12/2/2014. The decision maker refused to supersede on 8/7/2014, and he appealed.

9. The decision maker and the FTT considered the issue to be whether he had established that his walking problems existed prior to his attaining the age of 65 at a level consistent with an award of the higher rate of the mobility component; essentially whether or not he was in fact virtually unable to walk prior to 28/6/2004.
10. The FTT found that he had not shown that to be the case and his appeal was dismissed.

The case before me

The respective positions of the parties
The appellant

11. The arguments made in the application for permission to appeal by Mr Malik of the Coventry Law centre, who acts for the appellant, stand as the appellant's final position. There has been no comment on the matters set out in the Secretary of State's submission, or on the matters that I raised in my grant of permission.
12. The omission of the FTT to consider whether the appellant's GP records should be obtained was said to be an error of law, given the inquisitorial role of the tribunal, and a material error since such records could have provided contemporaneous evidence of the appellant's condition on 28 June 2004 when the appellant became 65, thus helping the tribunal to decide whether there had been a relevant change of circumstance since the awarding decision. It was argued that the appellant, who was then without representation, did not appreciate that medical records could advance his case.
13. The absence of an enquiry as to the appropriateness of a domiciliary hearing is said to be an error of law. The assumption the FTT made that the available contemporary documentary evidence was likely to be more accurate than the appellant’s oral evidence on the point was misplaced; the appellant has instructed his representatives that he would be able to explain what his mobility problems were in June 2004 and how they had changed since 1999.
14. It was wrong to rely on the inference that he was not housebound immediately prior 2007 to answer the question as to whether he was virtually unable to walk in 2004, since that test did not require a person to be housebound.

The Secretary of State

15. The Secretary of State does not support the appeal. In relation to whether the tribunal could consider the matter at all, other than indicating that the 13 month time limit for appealing the previous (2013) decision had concluded, no observations are made.
16. On the issue of whether or not the tribunal should have adjourned it is argued that the content of the statement generally shows that the provisions of rule 27 of the tribunal procedural rules were properly considered. The appellant indicated that he did not wish to attend, and the tribunal were entitled to respect that view if they felt that they were able to decide the matter fairly without an oral hearing. Given their view that oral evidence would not shed a light on the matter they had to

consider, and they were entitled to take that view and continue as they did.

17. As to the domiciliary visit, the previous points are once again prayed in aid, and in addition, in response to my request for observations as to the appropriateness of domiciliary visits in general, observations that I made in the case of *KO-v- Secretary of State For Work and Pensions (ESA) UKUT [2013] 544 (AAC)* are set out. Adopting my reasoning there it is submitted that a domiciliary visit will only rarely be appropriate.
18. As to the impact of holding domiciliary hearings on the principle of public justice the Secretary of State brings the case of *CSE/912/2013* to my attention, whilst conceding that it was concerned with somewhat different issues.
19. Finally the Secretary of State opines, in response to the issue I raised as to whether a tribunal is able to take public resources into account in its deliberations under rule 27, that it can.

The erroneous FTT approach

20. The FTT proceeded on the basis that that because the appellant had an existing DLA award, in order for him to qualify for the higher rate mobility component he had to show that his walking ability met the test for an award of that component prior to his turning 65, which occurred in June 2004, some ten years prior to the date of hearing.
21. In fact it seems to me that the tribunal approach gave the appellant an opportunity that in law did not exist. However since to a large extent the case has proceeded on the basis that this was the proper approach I have considered all matters that I referred to in the grant of appeal; the appellant does not succeed in relation to any of the points made on his behalf.
22. I must initially explain the legal position regarding awards of the higher rate of the mobility component for those aged over 65.

The legal framework

23. I begin with Section 75 of the Social Security (Contributions and Benefits) Act 1992, (SSCBA) which sets out the position of entitlement for those aged over 65. The section is entitled "Persons who have attained pensionable age" and the relevant parts state:

75 (1) “Except to the extent to which regulations provide otherwise, no person shall be entitled to either component of a disability living allowance for any period after he attains the age of 65 otherwise than by virtue of an award made before he attains that age.”

(2) Regulations may provide in relation to persons who are entitled to a component of the disability living allowance by virtue of subsection (1) above that any provisions of this act which relate to disability living allowance….

(a) shall have effect subject to modifications, rejections or amendments;
or
(b) shall not have effect.

24. The Social Security (Disability Living Allowance) Regulations 1991(which I refer to as the Regulations or the DLA Regulations) provide the detailed framework in relation to awards. Regulation 3

makes provision for those aged over 65. I pause to observe that unlike the SSCBA the regulations have not been amended to substitute 'pensionable age' for the age of 65, but that is immaterial in relation to the matters arising here. Regulation 3 states

> **Age 65 or over**
>
> **3.**—(1) A person shall not be precluded from entitlement to either component of disability living allowance by reason only that he has attained the age of 65 years, if he is a person to whom paragraphs (2) and (3) apply.
> (2) Paragraph (3) applies to a person who–
> (a) made a claim for disability living allowance before he attained the age of 65, which was not determined before he attained that age, and
> (b) did not at the time he made the claim have an award of disability living allowance for a period ending on or after the day he attained the age of 65.
> (3) In determining the claim of a person to whom this paragraph applies, where the person otherwise satisfies the conditions of entitlement to either or both components of disability living allowance for a period commencing before his 65th birthday (other than the requirements of section 72(2)(a), or, as the case may be, section 73(9)(a) of the Act (3 months qualifying period)), the determination shall be made without regard to the fact that he is aged 65 or over at the time the claim is determined…….
> (4) Schedule 1, which makes further provision for persons aged 65 or over shall have effect."

25. This provides for the situation where an application for DLA is made prior to an applicant becoming 65 but the decision is made after that date, but that is not the position here.
26. Further provisions as to those aged over 65 are made under subparagraph (4) by way of Schedule 1.

Schedule 1

27. Schedule 1 to the Regulations is entitled "Persons aged 65 and over" and deals in detail with the complexities with can arise due to what appears to be the ironing out of the discrepancies between DLA and the more onerous criteria for receipt of Attendance Allowance which is payable to those who claim after they are 65, and the preservation of the position of those who qualified for DLA due to disability which gave rise to significant needs in their younger years.
28. I set out the parts of Schedule 1 with which I need to deal.

> PERSONS AGED 65 AND OVER
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> **Revision or supersession of an award made before person attained 65**
> **1.—**(1) This paragraph applies where–
> (a) a person is aged 65 or over;
> (b) the person has an award of disability living allowance made before he attained the age of 65;
> (c) an application is made in accordance with section 9 of the 1998 Act or section 10 of that Act for that award to be revised or superseded and
> (d) an adjudicating authority is satisfied that the decision awarding disability living allowance ought to be revised or superseded.

(2) Where paragraph (1) applies, the person to whom the award relates shall not, subject to paragraph (3), be precluded from entitlement to either component of disability living allowance solely by reason of the fact that he is aged 65 or over when the revision or supersession is made.
(3) Where the adjudicating authority determining the application is satisfied that the decision ought to be superseded on the ground that there has been a relevant change of circumstances since the decision was given, paragraph (2) shall apply only where the relevant change of circumstances occurred before the person attained the age of 65.

Revision or supersession of an award other than a review to which paragraph 1 refers
2. References in the following paragraphs of this Schedule to a revision or supersession of an award refer only to those revisions or supersessions where the awards which are being revised or supersession were made–
(a) on or after the date the person to whom the award relates attained the age of 65; or
(b) before the person to whom the award relates attained the age of 65 where the award is superseded by reference to a change in the person's circumstances which occurred on or after the day he attained the age of 65.

Aged 65 or over and award of lower rate mobility component
6.—(1) This paragraph applies where a person on or after attaining the age of 65 is entitled to the mobility component payable at the lower rate specified in regulation 4(2) and–
(a) an adjudicating authority is satisfied that the decision giving effect to that entitlement ought to be revised under section 9 of the 1998 Act or superseded under section 10 of that Act, or
(b) the person makes a renewal claim for disability living allowance.
(2) A person to whom this paragraph applies shall not be precluded, solely by reason of the fact that he has attained the age of 65, from entitlement to the mobility component but in determining that person's entitlement to that component section 73(11) of the Act shall have effect in his case as if paragraph (a), and the words "in any other case" in paragraph (b), were omitted.

The appellant's position

29. This appellant had been in receipt of an award of the lower rate of the mobility component, as well as the care component at the middle rate, prior to his becoming 65. Following his 65th birthday he made two applications for supersession, but no change was made to the mobility award; the most recent decision not to change that aspect of the award implicitly accepted that the earlier decision was factually correct.
30. As the Secretary of State points out in his submission, that decision is now unable to be the subject of an appeal. The matter that I am dealing with arises out of a fresh application to supersede it.
31. The application relies on a pre-2006 change of circumstance; it alleges that claimant was been virtually unable to walk in or prior to 2004 when he attained 65. It is far too late for the appellant to apply for a revision of any earlier decision. The only application he can make is for supersession, and given the circumstances that he put forward the only available ground for supersession is that the decisions of 2006 and 2013 were made in ignorance of or under mistake of fact.

The workings of the Schedule
Schedule 1

Paragraphs 1 and 2

32. Paragraph 1 of the Schedule ameliorates the prohibition on entitlement in section 75 (1) SSCBA in respect of either component where an award was made before the person attained 65, and provides for either component to be increased or acquired after the age of 65 where there has been a relevant change of circumstances which occurred before the person attained the age of 65.
33. Although this appellant had an award prior to his attaining 65 and alleges that a relevant change occurred before he attained 65 paragraph 1 is not a complete answer, as the subsequent paragraphs cover the position where an award is made after that birthday, and an award is not limited to an initial award. An amended Schedule came into effect in October 1999, soon after the major reforms of the 1998 Social Security Act, which abandoned the concept of review of decisions, substituting the regime of revision and supersession. The drafting perhaps reflects the fact that these concepts were in their infancy. The decision of Upper Tribunal Judge Mesher in *CDLA/301/2005* deals with some of the drafting difficulties. He points out at paragraph 25

> the language of paragraph 1(1)(c) is technically inaccurate, in that one could never apply for review of an award, and cannot now apply for revision or supersession of an award in accordance with section 9 or 10. One can only apply for revision or supersession of a decision.

34. That point is important here. For paragraph 1 to permit the appellant to argue that he met the criteria for a higher rate mobility award prior to attaining 65 he must rely upon the original award made prior to his attaining 65, but there are two decisions subsequent to his attaining 65; the decision on the appellant's supersession request in 2006 and the further decision made on 8/7/2013 on his similar request in 2013. What he was in fact able to apply to change was the most recent decision of 2013. It amounted to a fresh award made after he was 65.
35. Accordingly paragraph 2(a) operated to apply the subsequent paragraphs of the Schedule, and make him subject to the rule set out in paragraph 6.

Paragraph 6

36. Set out above, this covers the appellant's situation; he was entitled to the lower rate of the mobility component on and after attaining the age of 65. The question of supersession arose under paragraph (6 (1) (a) therefore subparagraph (2) applied to effectively cap any mobility award at the lower rate. That sub-paragraph operates to amend section 73(11) SSCBA so that it reads "the weekly rate of the mobility component payable to a person for each week in the period for which he was awarded the component shall be the lower rate". That is the effect of the removal of the words set out in paragraph 6 (2) from section 73 (11).
37. This means that even where it can be shown that the recipient of a lower rate mobility award in fact qualifies or qualified for an award of the mobility component at the higher rate, the weekly rate of any mobility award is the lower rate.

38. Whilst the adjudication and appeal process is left in place the result of any such adjudication cannot be to increase the award, and as such any application for an increase is futile. My analysis does not indicate that the case is one in which the FTT lacks jurisdiction, but arguably an appeal could be dealt with at FTT level by applying the provision to strike out the appeal under rule 8 (3)(c) as having no reasonable prospects of success.
39. That would have been an available approach to a FTT had the DWP, as they were entitled to do, treated the 2014 supersession application, made some 4 months after the Secretary of State's 2013 decision increasing the care award to the highest rate but refusing to increase the mobility component, as a late attempt to appeal that decision; the analysis that I set out above would have applied equally to an appeal against the earlier, 2013 decision.
40. For completeness I mention a reported decision of Upper Tribunal Judge Levenson *R(DLA) 1/09* in which, having considered the purpose of the legislation and the interplay between DLA and AA in some detail, he rejected an argument that the concept of an age 65 cut-off was discriminatory or otherwise in breach of human rights law.

An error of law, but not a material error

41. In the light of the above analysis the decision of the tribunal to entertain the arguments in relation to mobility was wrong; however the decision to which it came, that there would be no change to the existing award, was the only possible legal conclusion. For me to set their decision aside because it contained an error of law and substitute a decision to the same effect would be futile, so I leave the decision dismissing the appeal to stand.
42. In the circumstances the procedural matters are of secondary importance; indeed my observations become, in legal language, *obiter dicta:* 'by the way' remarks not critical to the outcome. Nonetheless I will deal with the procedural arguments because they formed the major part of the submissions before me.

The procedural issues

43. I begin by saying that I see the force in Mr Malik's observations in respect of the inquisitorial nature of the tribunal, and in his references to the decision in *Mongan –v- Dept for Social Development [2006] NICA 16*, a decision of the Court of Appeal in Northern Ireland, which has echoes in the later case in the Court of Appeal in England and Wales in *Secretary Of State for Work and Pensions-v- Hooper [2007] EWCA Civ 495.*
44. Contrary to the view expressed by the Secretary of State's submission it cannot be necessary for an application to be made for the obtaining of medical records by the tribunal or the facilitation or participation in the hearing by a domiciliary visit or other means of assistance prior to a tribunal considering whether it is just to take any particular steps to facilitate participation. There must, in an appropriate case, be a freestanding obligation on an inquisitorial tribunal to consider such

matters and I reject the points made to the contrary by M Jagger on behalf of the Secretary of State.

45. That does not mean that a tribunal must initiate such enquiries in every case; it need not treat litigants who are unrepresented as if they invariably needed help and guidance. The tribunal process does not consist of the hearing alone. The administrative arm provides information and options to an appellant at the outset and where there is no contra indication in the case papers the tribunal can rely upon the choices a litigant has made. Many appellants do not want to be present at a hearing; they are used to decisions in respect of benefit matters being made without their oral input and are happy to make their points on paper. That is a legitimate position to adopt; it does not necessarily indicate that the person does not know any better, but the tribunal must be alert to the possibility of a genuine lack of understanding of the possibilities. As Upper Tribunal Judge Lane pointed out in *AT-v-SSWP[2010] UKUT 430 (AAC)*

> 10 In the Social Entitlement Chamber, where claimants tend to be unrepresented and often disadvantaged in a variety of ways, it may well be necessary for a tribunal to override an appellant's choice in order to do justice. This may occur, for example, where the tribunal notices (or should have noticed) a material point which could affect the outcome of the case which a layman would not appreciate, or where the tribunal believes the appellant may have evidence whose significance he does not understand.

46. Similarly the tribunal might wish to find a way to enable someone who mentions an obstacle in the way of their attending, the chance to do so. What is suggested here is that a domiciliary hearing was the only way to facilitate participation.

A domiciliary hearing?

47. As I said in the case of *KO-v- Secretary of State For Work and Pensions (ESA) UKUT [2013] 544 (AAC)*, *(KO-v-SSWP)* cited in the submission of the Secretary of State, the position has changed in recent years in relation to domiciliary hearings.
48. There are procedures which must be followed which make these hearings difficult to arrange. Aside from their cost, and the procedure necessitates a full session being set aside when otherwise a panel of, in this case three, would be sitting at a venue hearing a number of cases, pre-hearing checks must be made before a home can become the temporary workplace for a tribunal and its administrative staff.
49. Further, since 2008 the tribunal procedural rules have crystallised the position under article 6 ECHR in relation to a fair and public hearing (rule 30 (1)). The case of *CSE/912/2013,* whilst not entirely on the point at issue here, emphasises the importance of justice being done in public, which is to say at a place to which the public have access and during the course of the normal business day. There are, however, provisions in the FTT procedural rules to hold a hearing in private (rule 30 (2)(b)), and that may be appropriate in cases where the subject matter is particularly personal or an appellant extremely sensitive, however what appears to be being called for here is the routine offer of

a domiciliary hearing for somebody because they find it difficult to get around. I cannot accept that is either necessary or appropriate.

50. That position does not rule out participation for those who would find travel to a venue difficult. Transport can be arranged; it is unusual for somebody to be unable to go out at all, given assistance. Technology, including telephony, can conveniently enable the parties to give evidence and answer questions without physically attending. I need not elaborate, but I reiterate the remarks I made in *KO-v- SSWP*; *the* need for a domiciliary hearing would be wholly exceptional. There is no indication here that, were it thought to be necessary, arrangements other than holding the hearing at his home could not have been made to enable the appellant to attend or otherwise participate.
51. In fact the decision of the tribunal to accept the appellant's election to have the matter dealt with on the papers, given what they thought to be the compass of the hearing and their view as to the adequacy of the evidence which they already had was not unfair, and is sustainable.

Resource issues

52. As to whether under the procedural rules the wider picture can be taken into account, that is to say whether administrative resources can be a considered in relation to the holding of a domiciliary hearing where alternatives might be available more economically, the Secretary of State argues that they can. I agree. I find some support for that in the decision of Upper Tribunal Judge Jacobs in *MH-v Pembrokeshire CC [2010] UKUT 28 (AAC)* at [20] and [21]

20. As to delay, that is only relevant if it is compatible with the proper consideration of the issues. In any event, the delay would be short and would not cause any prejudice to the other party.

21. So far I have not considered the operation of the tribunal system as a whole. This is a permissible consideration. There would be some impact, as the resumed hearing of this case might cause other cases waiting for a hearing to be delayed. I suspect that too much can be made of this. There is surely always some flexibility in listing and the possibility of cases being substituted if other cases are adjourned out of a list. Any impact would be minimal. It was not caused by any deliberate act on the part of the claimant or his mother, merely their lack of understanding. And there had been no history of delay or tactical manoeuvring.

53. I respectfully agree with that view. Rule 2 of the Tribunal Procedure (First-Tier Tribunal) (SEC) Rules 2008 (the procedural rules), which sets out the overriding objective of the rules which is to enable the tribunal to deal with cases fairly and justly. Paragraph 2 (2) states that dealing with a case fairly and justly includes (as is relevant here)

(a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of these seas, the anticipated costs and the resources of the parties;
(b) …
(c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings

54. That is not to say that resources should be the driving force or that costs trump the interests of justice. It is a matter of balance. Where there are methods of enabling participation adequately although they fall short of physical attendance, and the costs of going the extra mile to enable actual attendance would be considerable, the tribunal may justifiably prefer an alternative and more economical method even where a party wishes it to be otherwise. Hearings must be fair, but that is not to say that every aspect of a hearing will please those involved; there may be a number of ways in which a fair platform is created.
55. Although the resources of the Secretary of State are significant in comparison to members of the public they are not without limit.
56. The key to the decision making process is to deal with the case in a proportionate manner bearing in mind its importance and complexity as well as the costs of any arrangements which might need to be made. The tribunal is well placed, using the detailed information before it and perhaps its special expertise if dealing with issues of disability, to decide what method of hearing is appropriate given the particular circumstances of the case and its own resources. A proper balance between these two aspects which delivers justice is achievable. Thereafter the Upper Tribunal may consider whether there has been a breach of natural justice, which is a matter of law, the issue being 'whether the claimant was dealt with fairly, not whether the tribunal came to the one and only perfect conclusion'. *(*Judge Jacobs *L'Ol –v- Secretary of State for Work and Pensions [2016] UKUT 10 (AAC [36]))*
57. Whilst a domiciliary hearing is not impossible it seems to me that it would be a rare case in which such a hearing was a proportionate method of enabling participation, and in general other solutions are likely to be preferred.

My conclusions

58. The fatal misapplication of the law that I referred to above has not led to an outcome which is wrong. It would accordingly be futile for me to set it aside only to substitute another decision to the same effect.

Upper Tribunal Judge Paula Gray

(Signed on the original on 25 April 2016)

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