Claimant – Going on Holiday

going on holiday – used in evidence

KN v Secretary of State for Work and Pensions (ESA) – [2011] UKUT 229 (AAC) – CE/3002/2010 held:

"16. In March 2010 the appellant flew to the West Coast of the USA for a 10 day holiday. This fact clearly had a considerable impact on the tribunal. The holiday was referred to frequently throughout the course of the tribunal's statement of reasons… It was used both in general terms to cast doubt on the appellant's account of her condition … and with regard to particular physical descriptors… As I indicated when giving permission to appeal, the tribunal's focus on this holiday was perhaps understandable, given the appellant's claims in the ESA50.

17. There was, however, a fundamental problem. The Secretary of State's decision on the appellant's ESA [*Employment and Support Allowance*] claim was made on 14 October 2009… So was the tribunal entitled to take the holiday into account? [*My insert*]

18. The short answer to that question is "Possibly, but possibly not" or "It all depends". Section 12(8)(b) of the Social Security Act 1998 states that a tribunal "shall not take into account any circumstances not obtaining at the time when the decision appealed against was made." The relevant decision in this case was made about six months before the vacation in question. So, on the face of it, the holiday was irrelevant.

19. However, the position is not that straightforward. It is clear from decisions of the Social Security Commissioners that later evidence is admissible, provided that it relates to the circumstances prevailing at the time of the decision under appeal: see *R(DLA)2/01* and *R(DLA)3/01*. So the appellant's ability to manage a long-haul holiday to the USA might well be highly relevant, if, for example, her condition in March 2010 was broadly the same as it was in October 2009. I have to say that I am reluctant to conclude that the tribunal ignored such a well-known proposition of law.

20. There is, however, no evidence that the tribunal actually had regard to this principle. Even if it did, there is an inadequate factual basis, and no satisfactory explanation, for why the tribunal felt it could rely on the USA holiday in the way that it did. For example, there is no finding in the statement of reasons that the appellant's condition was essentially the same in October 2009 as it was in March 2010. It may well have been, but the tribunal does not say so.

21. True, the appellant's father states in his original grounds of appeal that his daughter was asked at the hearing whether her condition had become worse since the medical examination …, which of course was slightly earlier than the decision under appeal to the tribunal. However, this point is not picked up in any detail in either the record of proceedings or statement of reasons. According to the record of proceedings, all she said was that she was "I am worse now"… This may have been the answer to the question reported by her father. But there is no fact-finding or reasons in the statement of reasons which ties in her comparative circumstances at the three key dates (the date of decision under appeal, the date of the vacation and the date of the hearing).

22. At the very least, as Mr Page [*representative for the Secretary of State*] submits, some sort of explanation was called for as to the significance of the USA trip, given the terms of section 12(8)(b) of the 1998 Act. The tribunal's failure to do so amounts to an error of law.

23. By way of a postscript, I should add that the tribunal's approach in the present case is one that is often seen in tribunal decisions, in relation to both ESA and disability living allowance (DLA) appeals. There is no doubt that many tribunal judges and members ask appellants about their holidays. There is nothing wrong with this at all, if it is relevant and focussed. The danger, however, is that some tribunals may jump from a simple finding of fact that the claimant had managed on one occasion in the last year to negotiate an airport to go on holiday to the conclusion that therefore s/he cannot possibly either have limited capability for work or be entitled to the higher rate mobility component of DLA. Such tribunals do so at their peril, as they arrive at an outcome without passing Go, or at least the departure gate for proper fact-finding and adequate reasoning.

24. In the present case the walking descriptor for ESA was one of those functions put in issue on the appeal. The dangers of taking too simplistic an approach to airport transfers has been highlighted in a number of decisions in relation to the higher rate mobility component of DLA (see for example Deputy Commissioner Mark in *CDLA/3165/1998* and Judge Poynter in *CDLA/2108/2010*). As Mrs Commissioner Jupp observed in *CDLA/3331/2006*, "Although walking through an airport is usually indoors, and thus does not fall within regulation 12(1)(a)(ii) of the Social Security (Disability Living Allowance) Regulations 1991, it may be of some evidential value but only if the appropriate findings of fact can be made" (at paragraph 3). Those findings of fact must also, of course, bear in mind section 12(8)(b) of the 1998 Act.

25. Tribunals should be wary of becoming fixated on the fact that an appellant may have undertaken a long-haul flight to some exotic holiday destination. The reality, unsurprisingly, is that most social security claimants are not frequent flyers. For some people, if they do fly, it is for a holiday of a lifetime or because of some pressing family business. Given that the assessment of the effects of a person's condition for the purposes of both DLA and ESA is meant to be looked at in the round, it may be more helpful for tribunals to focus rather more on (for example) the sort of walking that claimants do in a typical week, rather than on an infrequent and quite probably exceptional foray through a major domestic airport." [*My insert*].

Judge of the Upper Tribunal Nicholas Wikeley 31.5.2011

going on holiday…

CDLA/2849/2000 concerned a case where the claimant (who suffered from immunoglobulin deficiency) had had a life time higher rate care and mobility award removed on review. This was a decision that was supported by a later appeal tribunal. The Commissioner set aside the tribunal's decision for failing to deal properly with an Occupational Therapist's report and inadequacy of reasons in concluding that the claimant's evidence was not credible.

The Commissioner in providing guidance to the new tribunal on matters of evidence held:

"7. … Finally, the majority of the appeal tribunal appear to have attached significance to the fact that the claimant went to Spain for a holiday. Again, this is a matter for the new tribunal. However, for my own part, I would hesitate to attach much, if any, significance to a short, and probably not very energetic, holiday taken in a warm climate a short plane journey from the claimant's home."

Commissioner J P Powell 1.12.2000