Benefits

Calibrating disability

Desmond Rutledge considers caselaw on the cooking test

The lowest rate of Disability Living Allowance care component is payable to a person *'for any period throughout which he is so severely disabled physically or mentally that... he cannot prepare a cooked main meal for himself if he has the ingredients.'*[1] This is more commonly known as the 'cooking test' or 'main meal test' and has been the subject of much, often conflicting, caselaw. A recent House of Lords decision has dealt a blow to some claimants with fluctuating conditions. This article considers the effects of the Moyna case and highlights several other outstanding issues. It applies to England, Wales and Scotland.

The nature of the test

The main meal test was intended to be a simple and effective measure of disability.[2] **R(DLA)2/95** declared the test was to be 'determined objectively.' Both the claimant's cooking skills and 'factors such as the type of facilities or equipment available' were 'irrelevant'. The decision gave the impression that the test consisted of a list of clearly identifiable tasks or operations essential to the preparation of a cooked main meal. If the claimant were unable to perform any one of these tasks then s/he would be deemed to have satisfied the test, regardless of the reality of the position. It soon became clear that the Commissioners saw the test in much broader terms; it was all a question of what was reasonable in the circumstances. The test may be abstract but it was to be viewed in practical terms. Anything that could affect the claimant's ability, including the environment of the individual's kitchen, was to be taken into account in addition to the operations described in **R(DLA)2/95**.[3] What the claimant could reasonably be expected to achieve was also relevant. One Commissioner described the nature of the test in the following terms: 'Although the 'cooking test' is a hypothetical and abstract test, in the sense that it is not concerned with questions such as a claimant's cooking skills or the need for a claimant to cook for himself in practice, it was held in **R(DLA)1/97** that questions of reasonableness are nevertheless relevant when applying the 'cooking test', just as they are when considering each of the other tests of entitlement to the care component. Reasonableness for the purposes of the 'cooking test' is to be judged in relation to the practicality of the particular claimant carrying out the hypothetical task prescribed by s.72(1)(a)(ii) and may, therefore, take into account 'devices to assist' (**R(DLA) 2/95**) or 'coping stratagems' (**CDLA/ 5686/1999**), provided that such devices or stratagems are not special or unusual. The question in each case is whether it would be reasonable to expect a person in the claimant's position to cook a main meal for one on a traditional cooker, or, as it was put by the Chief Commissioner for Northern Ireland in **C41/98(DLA)**, whether a reasonable person would consider it unreasonable for the particular claimant to carry out that task.'[4]

Moyna

The point decided in **Moyna v Secretary of State for Work and Pensions** [5] was a narrow one, focussing on the meaning of 'period throughout which', but the construction given to this term by the Court of Appeal would have widened the conditions of entitlement to many claimants with fluctuating conditions (**Adviser** 92). Kay LJ held that a tribunal had been wrong to conclude that the claimant did not satisfy the test having made a finding that she could not prepare a meal for one to three days a week. Kay LJ said that a 'clear and regular pattern' of being unable to provide a cooked main meal over a qualifying period of nine months was sufficient to satisfy the test, bearing in mind the effect this would have upon a person's quality of life. Kay LJ, therefore, rejected the view that in cases involving intermittent or variable conditions one tribunal could award benefit where another might not. Parliament intended the test to be a simple and straightforward one to administer. The test should, therefore, produce the same result when faced with the same facts.

Lord Hoffman, giving the only opinion in the House of Lords, disagreed (**Adviser** 100). The purpose of the test was not to ascertain whether the applicant could maintain a reasonable quality of life without assistance. It was a 'notional' test, created to 'calibrate the severity of the disability.' The reasons why the claimant needed assistance could be just as relevant as the number of occasions on which it was needed: 'In any case in which a tribunal has to apply a standard with a greater or lesser degree of imprecision and to take a number of factors into account, there are bound to be cases in which it will be impossible for a reviewing court to say that the tribunal must have erred in law in deciding the case either way... I respectfully think that it was unrealistic

of Kay LJ to think that he was able to sharpen the test to produce only one right answer. In my opinion the Commissioner was right to say that, whether or not he would have arrived at the same conclusion, the decision of the tribunal disclosed no error of law.'[6]

However, the House of Lords decision does not mean that claimants who are sometimes able to prepare a cooked main meal will not qualify for benefit. The Lords confirmed that the test requires taking a broad view and that: 'It involves looking at the whole period and saying whether, in a more general sense, the person can fairly be described as a person who is unable to cook a meal. It is an exercise in judgement rather than an arithmetical calculation of frequency.'

Outstanding issues

The House of Lords described the main meal test as a notional test, a thought-experiment, but there is an inherent difficulty in using a thought experiment to assess someone's **actual** ability to perform a prescribed **hypothetical** task. Where the claimant always relies on convenience food or the help of others the thought experiment will become wholly speculative in nature unless proper regard is had to the extent and nature of the claimant's actual disability. In **CDLA/4958/2000** the medical examiner said the claimant could not lift pans at all. Refusing the appeal, the tribunal said that the claimant would be able to drain vegetables using a slotted spoon and this would remove the need to move pans. However, this suggestion only addressed one aspect of the test - how to cope with hot pans - it did not explain how someone who was unable to lift pans was supposed to move pans on and off the cooker in the first place. This shows how examples from decided cases should not be used in a formulaic manner, as they may not address the specific difficulties faced by the claimant. For example, previous cases have ruled that the main meal test is not as a matter of law a test of bending, as cooking does not presuppose the use of an oven.[7] However, as a matter of evidence, a claimant's ability to bend may still be relevant in those cases where it is considered reasonable for the claimant to use a conventional oven at a conventional height.[8]

Even familiar suggestions, such as the use of a high chair to avoid standing, may not be a complete answer in every case; it is all a question of what is reasonably practical for that particular claimant.[9] To take another example, if a claimant can lift a light saucepan to cook vegetables, does it follow that an inability to use a larger pan to cook the main ingredient can simply be ignored? In the debate over the relevance of microwave ovens to the test, it is generally accepted that, if the claimant uses the microwave for something more than heating up convenience foods, then this should be taken into account.[10] But even where in practice the claimant makes substantial use of a microwave, should it be seen as a complete substitute for a cooker? It is not obvious how a claimant's ability to use a microwave oven is relevant to cooking a main meal using a traditional cooker. A cooked main meal implies that the ingredients are cooked at the same time. Is it reasonable to expect a claimant to achieve the necessary degree of readiness? Can the ingredients be kept warm without an oven? Some Commissioners have opined that it would be wrong in principle to have any regard to a microwave if the claimant could not use a traditional cooker, for example due to asthma.[11]

Conclusion

Decided cases help define the nature of the test, but they can only give general guidance on how the test should be applied in specific instances. It is, therefore, important that when a tribunal thinks a solution to a specific difficulty can be devised, it states what that solution is and why it is thought to help. It is also good practice to invite the claimant to comment on what is being suggested.[12] The more severe the effects of a claimant's disability are, the fuller a tribunal's reasons for refusing benefit will need to be.

In summary

The main meal test is a notional test, created to calibrate the severity of the disability (**Moyna**)

The question in each case is whether, for all practical purposes, it is reasonable to expect a person in the claimant's position, to cook a main meal for one on a traditional cooker (**CDLA/3778/2002**)

If the case involves a variable condition, the claimant's ability should be considered over the whole of the qualification period to decide whether, in a general sense, he or she can fairly be described as someone who is unable to prepare a cooked main meal (**Moyna**)

The test may take into account 'devices to assist' or 'coping stratagems' provided it is reasonably practical for the claimant concerned to take advantage of the device or stratagem that is being proposed (**CDLA/5658/1999**)

When a decision maker or tribunal thinks a solution to a specific difficulty can be devised it should state what that solution is and why it is thought to help; it is also good practice for tribunals to invite the claimant to comment on what is being suggested (**CDLA/4214/2002**)

Footnotes

1. s.72(1)(a)(ii) Social Security Contributions and Benefits Act 1992
2. Lord Henley, Hansard 7 March 1991, Col 1545
3. CDLA/20/94, CSDLA/50/95 and CDLA/4214/2002
4. CDLA/3778/2002 para 7
5. [2003] UKHL 33
6. Para 20
7. C41/98(DLA)(*4/01) and CDLA/770/2000(*39/01)
8. CDLA/5686/1999(*38/01)
9. R(DLA)8/02 para 7
10. CDLA/770/2000(*39/01) and CDLA/5250/2002
11. CDLA/3778/2002 following CDLA/020/1999
12. CDLA/4214/2002 para 16

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