

SOCIAL SECURITY CONTRIBUTIONS AND BENEFITS ACT 1992  
SOCIAL SECURITY ADMINISTRATION ACT 1992

APPEAL FROM A DECISION OF A DISABILITY APPEAL TRIBUNAL ON A  
QUESTION OF LAW

*Claimant's name:*

*Tribunal venue:*

*Durham*

*Tribunal number:*

*D/12/041/95/0111*

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**DECISION OF THE SOCIAL SECURITY COMMISSIONER**

1. My decision is as follows:
  - 1.1 The decision of the Disability Appeal Tribunal held at Durham on 8th September 1995 is erroneous in point of law: see paragraphs 5, 7 and 8 below.
  - 1.2 Accordingly I set it aside and, as it is not expedient for me to give a decision on the claimant's appeal from the adjudication officer's decision, I refer the case to a differently constituted Disability Appeal Tribunal for determination.
  - 1.3 I direct the Disability Appeal Tribunal which rehears this case to conduct a complete rehearing in order to determine whether at the date of claim or at any later date before the rehearing, the claimant was entitled to any rate of either component of Disability Living Allowance. In particular the tribunal will have regard to the guidance in paragraph 9 below.
2. The claimant's claim for Disability Living Allowance was treated as made on 3rd November 1994. Her claim was refused at both first and second tier adjudication. She appealed unsuccessfully to a tribunal and now appeals to the Commissioner, leave having been granted by a Commissioner. The adjudication officer supports the appeal and there is broad, although not complete, agreement between the grounds put forward on behalf of the claimant and the basis of the adjudication officer's support.
3. The case presented on behalf of the claimant at the hearing was that she was entitled to the higher rate of the mobility component and to the middle rate of the care component in respect of daytime attention, with a request to the tribunal to consider the lowest rate of the care component on the basis of the main meal test if necessary. The tribunal rejected those arguments. The grounds of appeal allege that the tribunal's reasons are inadequate and the adjudication officer supports the appeal on the same basis.

The higher rate of the mobility component

4. The most up-to-date evidence of the claimant's mobility related to her weekly visit to the supermarket. On the basis of this evidence the tribunal found that the claimant "walked round the supermarket on a Wednesday pushing a trolley some 180-200 yards stopping occasionally 4-5 times when she was in pain." They rejected her claim for the higher rate of the mobility component as follows:

"The appellant's walking, albeit slow, was capable of a distance of at least 200 yards which she did every Wednesday when carrying out her main shopping task with her husband. The walking, whilst it was slow and required several stops, she was not in severe discomfort, but she may well have been in some pain. The effort needed would not put her life at risk or lead to a deterioration in her health."

The adjudication officer had obtained a report from an Examining Medical Practitioner before making any decision on the claim. This report was in the papers which were before the tribunal. Surprisingly the tribunal made no reference to the clinical findings or expert opinion expressed in the report.

5. The legal test to be applied in order to decide whether a person is virtually unable to walk is related to a person's ability to walk "out of doors": see regulation 12(1)(a)(ii) of the Social Security (Disability Living Allowance) Regulations 1991. The tribunal's findings relate solely to the claimant's walking indoors. It is important to distinguish between the legal test to be applied and the evidence on which the decision is reached. The legal test to be applied is of a person's ability to walk out of doors. The tribunal's decision does not mention this. However, I see no reason to believe that they overlooked it. It is set out in the adjudication officer's submission to the tribunal and is so well known that I would need some clear indication before holding that the tribunal had misdirected themselves on this point. In reaching its decision the tribunal had to obtain such evidence as it could of the claimant's walking ability. The actual walking which a claimant undertakes is obviously relevant. There can be no criticism of the tribunal for taking this evidence, nor can there be any criticism of the tribunal for drawing conclusions from it. However, where that evidence relates to walking under different conditions from those set out in the legal test, the tribunal must relate that evidence to the terms of the test. There are a number of differences between walking in a supermarket and walking out of doors, for example: the surface is smoother, but it may be less easy to maintain a grip; the claimant may have the support of a trolley, which is different from that given by a walking stick; aside from stops because of pain or discomfort, progress around a supermarket may be impeded by other shoppers and will be slow with frequent stops of varying duration in order to look at and select items from the shelves. The tribunal must take account of such differences in relating the evidence of actual walking to the legal test. As a minimum the tribunal should have indicated that this has been done. Its reasons are, therefore, inadequate. This is an error of law.

6. The tribunal's reasons quoted in paragraph 4 above refer to both severe discomfort and pain. The claimant's representative and the adjudication officer have put forward different views on which is the lesser and on whether the tribunal's decision was erroneous in law in this respect. An analysis of the nature of, and relationship between, pain and (severe) discomfort is unnecessary and unhelpful. These are not words with precise meanings and the conflicting views on which is the lesser is an indication, if one is needed, that they

are not used uniformly. In the context of this decision, it is clear that the tribunal regarded pain as being less than severe discomfort. It is not clear how the claimant used these words or whether she had fully appreciated the significance in law of the words "severe discomfort".

7. It is important for the tribunal to avoid linguistic analysis, and to distinguish between the legal test to be applied and the evidence given. The legal test is of the claimant's walking ability "without severe discomfort": see regulation 12(1)(a)(ii) of the Disability Living Allowance Regulations. The tribunal should obtain evidence of the symptoms which the claimant experiences whilst walking. That evidence may or may not use words like "discomfort", "pain", "distress", or "agony". Regardless of the language used to describe the symptoms, the tribunal must then relate that evidence to the legal test. In doing so the tribunal will take into account (a) the whole of the evidence, including such matters as the diagnosis, medication, and any medical evidence of disablement; (b) their assessment of the claimant's credibility as a witness; and (c) their assessment of the claimant's pain threshold and ability to report symptoms accurately. Finally a decision must be made whether the symptoms experienced by the claimant are properly described as "severe discomfort". The tribunal's reasons should explain how they have related the evidence to the terms of the legal test. In failing to do so, they are inadequate and the decision is erroneous in law.

#### The main meal test for the lowest rate of the care component

8. The claimant's evidence on the main meal test was that her husband did the cooking under her supervision, although she could use a microwave oven and frozen foods. Her evidence related her difficulties to the arthritis in her hands and feet, causing problems with preparing vegetables, lifting pans and holding plates. The tribunal recorded that "the appellant could cook her own meal and did not pass the cooking test" and that the "tribunal were of the opinion that the appellant was capable of cooking a main meal for herself." Once again there was no reference to the Examining Medical Practitioner's clinical findings or expert opinion. As before the evidence had to be related to the legal test. It is clear from the quotations above that the tribunal applied the legal test correctly in that they considered whether the claimant could prepare a meal for one person. It was, therefore, necessary to relate the evidence of difficulties to the preparation of such a meal. The tribunal's reasons do not make clear whether the claimant's evidence of her difficulties (a) was merely rejected, or (b) was accepted but discounted as relating to a meal for two, or (c) was accepted but discounted for some other reason. The decision is in this respect also erroneous in law.

#### The rehearing

9. There must, therefore, be a complete rehearing of this case before a differently constituted tribunal at which all issues of fact and law will be decided afresh on the basis of the evidence at the rehearing which will include the Examining Medical Practitioner's report of 30th November 1994. In particular the tribunal will ensure that it not only relates the evidence to the terms of the legal tests but also explains in its decision how it has done so.

Signed: Edward Jacobs  
Deputy Commissioner

Date: 22 October 1997