THE SOCIAL SECURITY COMMISSIONERS

Commissioner's Case No: CSIB/60/96

SOCIAL SECURITY ADMINISTRATION ACT 1992

APPEAL FROM THE SOCIAL SECURITY APPEAL TRIBUNAL UPON A QUESTION OF LAW

COMMISSIONER: D J MAY QC

ORAL HEARING

Appellant:

Respondent: Adjudication Officer

Tribunal: Glasgow

Tribunal Case No: 581/95/1486

Walking (severe discomfort) and standing.

Commissioner's Case No: CSIB/60/96

DECISION OF SOCIAL SECURITY COMMISSIONER

1. This case came before me for an oral hearing on 21 October 1997. The claimant was represented by Mr Orr of the City of Glasgow Council. The adjudication officer was represented by Mr Neilson of the Office to the Solicitor of the Secretary of State for Scotland.

2. My decision is that the decision of the social security appeal tribunal given at Glasgow on 16 April 1996 is erroneous upon a point of law. I set it aside. I remit the case to a freshly constituted social security appeal tribunal for a re-hearing.

3. In this case and in respect of the claimant's claim for incapacity credits an adjudication officer decided that the claimant did not satisfy the all work test from and including 29 October 1995 because he had not reached 15 points from physical and mental descriptors. The total number of points awarded to the claimant by the adjudication officer was three. The claimant appealed to a social security appeal tribunal.

4. His appeal was heard on 16 April 1996. The tribunal upheld the adjudication officer's decision that the claimant was not incapable of work and could not be treated as incapable of work. However the tribunal gave the claimant a score of 13 points as set out in a schedule to the record of proceedings recorded at page 72. They held that the claimant satisfied the following physical descriptors namely 1(e), 2(c), 4(f) and 6(c).

5. The claimant appealed against that decision to the Commissioner. At the oral hearing before me Mr Orr on behalf of the claimant concentrated on the activity of walking and the activity of standing.

6. I deal first with the activity of standing. In Part 1 of the schedule to the Social Security (Incapacity for Work) (General) Regulations 1995 the activity is fully described as:-

> "4. Standing without the support of another person or the use of an aid except a walking stick."

The schedule specifies the following descriptors in respect of that schedule together with the points attracted for satisfying them:-

"

	(2) Descriptor	(3) Points
(a)	Cannot stand unassisted	15
(b)	Cannot stand for more than a minute before needing to sit down.	15
(c)	Cannot stand for more than 10 minutes before needing to sit down.	15

(d)	Cannot stand for more than 30 minutes before needing to sit down.	7
(e)	Cannot stand for more than 10 minutes before needing to move around.	7
(f)	Cannot stand for more than 30 minutes before needing to move around.	3
(g)	No problem standing.	0"

7. In the incapacity for work questionnaire the claimant in respect of the activity of standing indicated that he considered that he satisfied descriptor (c). This was reiterated before the tribunal by Mr Orr. Mr Orr's submission is noted by the chairman in his note of evidence:-

> "Standing - [The claimant's] own estimate was 10 minutes - descriptor refers to needing to sit down - this applied even if person did not sit down."

8. The tribunal made no findings in fact in respect of this. However in their reasons they said:-

> "Standing - The tribunal consider that on the balance of probabilities, [the claimant] stands for more than 10 minutes, regularly, eg when playing pool and when doing household chores, before needing to move around. Descriptor 4(f) applies."

9. It was Mr Orr's submission that the tribunal failed to deal with the case that was actually made by the claimant. It was his submission that descriptors (b), (c) and (d) are a different test from (e) and (f). This is because in respect of the former standing is related to the period before a need to sit down whereas in respect of the latter it is before the need to move around. He said that this matter was quite crucial in this case. I accept that because satisfaction of descriptor 4(d) would have attracted 7 points which would have taken him over the threshold.

10. Mr Neilson departed from paragraph 8 of the adjudication officer's submission to the Commissioner recorded at page 82. He accepted that the matter was crucial in this case. He did not seek to persuade me that Mr Orr's argument was wrong.

11. I am satisfied that the tribunal erred in law in relation to their treatment of the activity of standing. I accept that the nature of the tests set out in paragraphs (b) to (d) is a different one to that set out in (e) and (f). They cannot simply be regarded as grades on a sliding scale. It was thus incumbent in the event that the tribunal were not satisfied that the claimant satisfied the descriptor for (c) to set out the basis upon which they reached that view. On the face of the record of proceedings it is not apparent that the tribunal addressed the descriptors

relating to the requirement to sit down as opposed to move around. In these circumstances I am satisfied that they erred in law and their decision must be set aside.

12. That in itself is sufficient to dispose of the appeal. However also in issue before me was the tribunal's treatment of the applicable descriptor in relation to the activity of walking. The tribunal decided that the claimant satisfied descriptor 1(e) in relation to the activity of walking. That descriptor attracted 3 points and is in the following terms:-

> "Cannot walk more than 400 metres without stopping or severe discomfort."

13. The basis upon which the tribunal reached this conclusion is set out in finding 2 where they say:-

> "Most days Monday to Friday he goes to the Salvation Army to play pool in the afternoons. He usually walks one way, stopping to rest in the park and in the shopping precinct en route."

In their reasons they say:-

> "Walking - The tribunal noted Mr Orr's argument to the effect that [the claimant] cannot walk more than a few steps without severe discomfort. They accept that when he starts walking, initially, [the claimant] will have some pain and stiffness in his knees, but they think it is most unlikely that this can be equated with "severe discomfort" since is apparently able to walk for several hundred yards before making his first stop. The tribunal consider that descriptor 1(e) applies for walking."

14. Mr Orr's submission in relation to the matter is set out in the chairman's note of evidence and is in the following terms:-

> "Walking - [the claimant] is in severe discomfort when he starts walking then pain eases off. Question relates to how far he can walk without stopping or severe discomfort."

The claimant's own assessment in the all work questionnaire was that he satisfied descriptor 1(f) namely cannot walk more than 800 metres without stopping or severe discomfort which attracts no points. In the clinical history taken in the examining medical officer's report it is recorded:-

> "Both knees also pain, intermittent, not stiff help by anti inflammatory pain killers ..... afternoon goes to salvation army - plays pool for ½ hour and then sits down. Drinks tea. Waits there ¾ hour and then bus back."

The examining medical practitioner took the view that the claimant had no walking problem and made the following notes:-

> "Walks to Salvation army each day - ¾ hr. Walks to stop in morning 10 mins. Does not usually stop.
>
> .
>
> .
>
> Walked at normal pace. Very slight limp."

15. It was Mr Orr's submission that the tribunal had applied the wrong test. He submitted that the import of the tribunal's reasons was that they had selected descriptor 1(e) because that was when the claimant had to stop rather than when he was walking with severe discomfort. It was also the import of Mr Orr's submission that the claimant could satisfy the descriptor such as 1(b) or 1(c) in a situation such as was asserted in this case where the claimant when commencing walking suffers from pain and stiffness in his knees but this wears off. It was said by Mr Orr that he would satisfy the test and if on the basis of reasonable regularity he could not walk for 50 metres without suffering severe discomfort although he might be able to go for a long walk without severe discomfort once he had loosened up.

16. It was Mr Neilson's submission that in the present case the issue of severe discomfort did not arise. This in his submission was because although the claimant suffers from some pain and stiffness in his knees the tribunal took the view that this did not amount to severe discomfort. It was his submission that the tribunal applied the correct test. It was said that there was no suggestion that the claimant stopped because of severe discomfort. It was rather that he stopped for a rest.

17. I am not satisfied in relation to the activity of walking that Mr Orr has demonstrated to me that the tribunal erred in law. It is clear that the tribunal with regard to the submission made by Mr Orr were prepared to accept on a factual basis the claimant had some pain and stiffness in his knees when he started walking initially. It was however their view that this did not amount to severe discomfort.

18. The question of what constitutes severe discomfort was canvassed on the course of this appeal and I was referred by Mr Orr to paragraph 9 of RM1/81 where the Commissioner said:-

> "Shortly explained, the correct construction gives to the words "without severe discomfort" in context the sense of requiring that you are to look only at what are the limits (if any) of the claimant's ability to walk outdoors *without* severe discomfort, be the limitation(s) in point of distance, speed, length of time or manner, and ignore any extended outdoor walking accomplishment which the claimant could or might attain only *with* severe discomfort."

He also referred me to in Rowlands commentary on Medical and Disability legislation where the commentator said:-

> "In *Cassinelli v. Secretary of State for Social Services* (misreported in *The Times*, December 6, 1991) the Court of Appeal held that a medical appeal tribunal had erred in law when holding that a person was not virtually unable to walk because the exertion of walking did not cause "severe pain or distress". Glidwell L.J. said that that phrase seemed "to be drawing a distinction between the factor of pain, of which discomfort is a lesser concomitant, and the factor of distress which may arise for other reasons than pain; distress may result of course from pain or discomfort, but may also result from breathlessness, which is another matter to which the tribunal referred." He rejected the argument put on behalf of the Secretary of State that the tribunal had, inferentially at least, applied the right test and answered the right question. It is difficult to follow the logic of the decision but it is clear that tribunals depart from the statutory language at their peril. It remains arguable that breathlessness can give rise to severe discomfort."

I am not satisfied that these decisions which were in respect of mobility allowance in the context of a statutory definition of virtual inability to walk are of assistance in the instant case. This is not simply due to the different statutory contexts in respect of which the words "severe discomfort" fall to be applied. It is also because these authorities do not address the issue in this case which is one of degree. The tribunal accepted that when the claimant started walking he had pain and stiffness in his knees. However the tribunal took the view that the degree of pain and stiffness suffered by the claimant on the commencement of walking and thereafter did not amount to severe discomfort that was within their province. I do not consider that they could have said more about it than they did. In these circumstances I am satisfied that they did not err in law and that the Commissioner cannot interfere with their decision in that regard.

19. The case goes before a freshly constituted tribunal. In approaching their task the tribunal should follow what was said by the Commissioner in paragraph 11 of CSIB/324/97. They should also have regard in relation to the claimant's capacity to perform a descriptor with reasonable regularity what was said by the Commissioner in paragraphs 10 and 13 of CSIB/17/96 and to paragraph 7 of the Chief Commissioner in Northern Ireland's decision in CI/95(IB). The tribunal should appreciate that in "severe discomfort" there are considerable differences in respect of the context in which that phrase is used in regulation 12(1)(a)(ii) of the Social Security (Disability Living Allowance) Regulations 1991 and to the Incapacity for Work Regulations to which I have referred. That is clear from paragraph 4 of the adjudication officer's supplementary submission to the Commissioner recorded at pages 89 and 90 of the bundle. I accept the adjudication officer's submission that Commissioners' decisions relating to the definition of the circumstances in which the conditions of entitlement for disability living allowance mobility component are satisfied have no direct bearing per se on the question as to whether the all work test is satisfied. I am not satisfied given the different context of the phrase in respect of the different regulations for different benefits that it is safe to rely in respect of incapacity credits on definitions which had been formulated for mobility allowance and disability living allowance. If it is accepted by them that the claimant suffers from pain and stiffness particularly at the commencement of walking and they conclude, as is almost inevitable, that this constitutes discomfort the issue as to whether it is

severe is essentially both a jury question and one of degree. They must simply come to a conclusion on the evidence before them.

20. The appeal succeeds.

(signed)
D J MAY QC
Commissioner
Date: 28 October 1997