Bulletin 181

THE SOCIAL SECURITY COMMISSIONERS

SOCIAL SECURITY ADMINISTRATION ACT 1992
SOCIAL SECURITY CONTRIBUTIONS AND BENEFITS ACT 1992
SOCIAL SECURITY ACT 1998

Commissioner's Case No.: CDLA/3323/2003

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

DECISION OF THE SOCIAL SECURITY COMMISSIONER

MR COMMISSIONER ROWLAND

Claimant:	**Mr Joe Arthur Lewis Blair**
Tribunal:	**Wakefield**
Tribunal Date:	**13 June 2003**
Tribunal Register No:	**U/01/008/2003/01009**

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. I allow the claimant's appeal. I set aside the Wakefield appeal tribunal dated 13 June 2003 and I substitute for the tribunal's decision my decision that the award of disability living allowance made on 28 April 1999 is to be superseded for error of law and the claimant is entitled to the highest rate of the care component and the higher rate of the mobility component of disability living allowance from 29 August 2002 to 16 June 2006. Disability living allowance paid in respect of any part of that period in consequence of decisions of the Secretary of State and the tribunal must be treated as having been paid on account of my decision.

REASONS

2. There are in the papers before me reports of examining medical practitioners dated 5 March 1998 and 14 July 1998, both stating that the claimant had no function of his lower limbs and was unable to walk. In the first report, the claimant is recorded as having said that he had been wheelchair bound since falling down some steel steps in 1990 and that he had been diagnosed as suffering from hysterical conversion secondary to physical trauma. In answer to the question to what extent the claimant's disability was due to physical factors, the doctor wrote "all physical". In the second report, a different doctor answered the same question by saying:

> "Entirely a mental health problem, but I believe history. I think he has an hysterical paralysis and does not walk at all. I have no reason whatever to suspect him to be malingering or misleading us. His physical signs are <u>not</u> consistent with a spinal lesion, and whilst his legs are not wasted, they are very cold after the manner of someone who spends his day in a wheel chair."

3. I do not know when disability living allowance was first awarded to the claimant but, on 28 April 1999, a decision was made awarding the claimant the highest rate of the care component of disability living allowance from a date of which I am not aware until 16 June 2003. I suspect that that decision was made on a continuation claim. It must be presumed that the mobility component was not awarded because the Secretary of State considered that the claimant was not entitled to it due to the cause of his inability to walk.

4. Section 73(1)(a) of the Social Security Contributions and Benefits Act 1992 provides that a person may be entitled to the mobility component if -

> "he is suffering from physical disablement such that he is either unable to walk or virtually unable to do so".

Section 73(5) provides that circumstances may be prescribed in which a person is to be taken to satisfy or not to satisfy a condition mentioned in subsection (1)(a). Regulation 12(1) of the Social Security (Disability Living Allowance) Regulations 1992 provides –

> "A person is to be taken to satisfy the conditions mentioned in section 73(1)(a) of the Act (unable or virtually unable to walk) only in the following circumstances –

(a) his physical condition as a whole is such that, without having regard to circumstances peculiar to that person as to the place of residence or as to place of, or nature of, employment –
   (i) he is unable to walk; or
   (ii) his ability to walk out of doors is so limited, as regards the distance over which or the speed at which or the length of time for which or the manner in which he can make progress on foot without severe discomfort, that he is virtually unable to walk; or
   (iii) the exertion required to walk would constitute a danger to his life or would be likely to lead to a serious deterioration in his health; or

(b) …"

5. The terms of section 73(1)(a), restricting entitlement to the mobility component under that paragraph to those suffering physical disablement, are in obviously deliberate contrast to those of section 73(1)(d), which enable the mobility component to be paid – at a lower rate – in certain circumstances where a person is "severely disabled physically or mentally". A person who is severely mentally impaired and has severe behavioural problems may qualify for the higher rate of the mobility component under section 73(1)(c) but both those terms are defined in such a way that the claimant in the present case does not satisfy that condition. To be entitled to the higher rate of the mobility component in the present case, the claimant had to fall within the scope of section 73(1)(a).

6. On 29 August 2002, the claimant applied for supersession of the decision of 28 April 1999, seeking the mobility component. Quite what was said then I do not know because the Department have accidentally destroyed the relevant documents. However, a claim pack was submitted on 24 December 2002, in which the claimant said that he was now suffering from a back problem, had put on weight which put more stress on his hands, wrist and shoulders, was taking diazepam to help deal with his temper, had experienced severe pain and discomfort around his lower back and hips when using his callipers and was now able to negotiate two steps and to walk an extremely short distance but was still virtually unable to walk. On 28 January 2003, the claimant's general practitioner wrote a factual report, stating that the claimant was suffering from hysterical paralysis following a fall many years ago, that he had been suffering from low back pain for five months and that his mental state had been "normal" when he has last seen him on 18 December 2002. On 4 February 2003, the Secretary of State refused to supersede the decision of 28 April 1999 and the claimant appealed. Before the case came before the tribunal, a further award in the same terms was made in respect of the period from 17 June 2003 to 16 June 2006. The claimant's solicitors, Messrs Ridley and Hall of Huddersfield, argued that the claimant's current virtual inability to walk was due to physical problems rather than hysteria.

7. The tribunal dismissed the claimant's appeal. Their findings are set out clearly in the statement of reasons for the tribunal's decision.

> "2. On 20 July 1990, [the claimant] (born 8 November 1961) fell down stairs, injuring his spinal cord.
>
> 3. Since then, he has been virtually unable to walk. He uses a wheelchair. With callipers and crutches he can walk a few yards.

4. His condition has been fully investigated and diagnosed as hysterical paralysis which his GP, Dr G Eales confirms, and which [the claimant] accepts. [The claimant] also agrees this is a mental, not a physical problem.

5. In the last 18 months, he has developed low back pain. This in itself, would not restrict his walking to the extent that he is virtually unable to walk.

6. He has Tendinitis in both shoulders and Carpal Tunnel Syndrome in both hands, which limits the length of time he can hold his crutches. These are physical conditions, but use of crutches is only necessitated because of his hysterical paralysis.

7. Although the triggering event on 20 July 1990 was a physical occurrence so that the origin of his condition can be ascertained, the manifestations are mental, not physical in nature.

8. [The claimant] is virtually unable to walk. This is due entirely to hysterical paralysis. It is not a physical condition which renders him virtually unable to walk. He does not therefore satisfy the conditions for higher rate mobility component.

9. The cause of his virtual inability to walk has always been hysterical paralysis. There has been no change in his circumstances (apart from development of low back pain which is not a significant contributing factor to his walking problems) which would justify the supersession he requested on 29 August 2002."

The claimant now appeals against the tribunal's decision with my leave.

8. Mr James Wilson, of Messrs Ridley and Hall, advances two grounds of appeal on behalf of the claimant. Firstly, it is argued that the mere fact that the claimant was virtually unable to walk was sufficient to entitle him to benefit because Lord Scarman, in *Lees v. Secretary of State for Social Services* [1985] 1 A.C. 930 (reported also as an appendix to R(M) 1/84) emphasised that the forerunner of the present legislation was concerned with "the physical ability to move on foot" and, it is submitted, the claimant in the present case was physically virtually unable to walk, whatever the cause. Lord Scarman's reference to the physical ability to move on foot was made in a sentence emphasising that the legislation was not concerned with the direction of that movement and I do not consider any assistance is to be derived from *Lees*, where the claimant was undeniably suffering from physical disablement and the effect of which has been reversed by the introduction of what is now section 73(1)(d) of the 1992 Act. Nonetheless, Mr Wilson's contention that the claimant in the present case was in fact physically virtually unable to walk seems to me to have some force.

9. The second ground of appeal is that the tribunal's finding that the claimant's inability to walk was not due to a physical condition was against the weight of the evidence because the evidence was that his condition caused by his fall and the consequent damage to his spine. Reference is made to *Harrison v. Secretary of State for Social Services* (reported as an appendix to R(M) 1/88). That decision was also cited in CDLA/3966/97, a decision of Mr Commissioner Jacobs upon which the Secretary of State relies in submitting that, far from the decision reached by the tribunal in the present case being against the weight of the evidence, it was the only decision open to them on the evidence.

10. In CDLA/3966/97, Mr Commissioner Jacobs said:

> "15. The legislation assumes a three link chain of causation. The chain begins with an injury, disorder or disease. This produces disablement. That disablement leads to limitations to a person's mobility. The second and third links cannot be merged by arguing that the limitation on mobility is itself a physical disablement. The person must have a physical disablement or condition which is separate from and gives rise to those limitations: see Lord Justice O'Connor in the Court of Appeal in *Harrison v. Secretary of State for Social Services* (reported as an Appendix to the decision of the Commissioner in R(M) 1/88). This follows from the words "physical disablement *such* that ... he is virtually unable to walk".
>
> "16. It is the second link of the chain which must involve a physical disablement and requires the tribunal to decide whether the claimant's "physical condition as a whole is such that ... he is virtually unable to walk", not the first: see the decision of the Commissioner in CSDLA/265/97, paragraphs 12 and 16."

The Secretary of State appears to misunderstand that decision because he submits that the *first* link in the chain must be some physical disablement or condition, whereas Mr Commissioner Jacobs clearly states that it is the *second* link in the chain that must involve a physical disablement. I respectfully agree with Mr Commissioner Jacobs.

11. In my view, some of the confusion in this area is due to there being too much concentration on the words of section 73(1)(a), when the focus should be on the words of regulation 12(1)(a), because regulation 12(1) provides an exclusive explanation of what is meant by section 73(1)(a). Regulation 12(1)(a) makes it clear that disablement is to be regarded as physical for the purposes of section 73(1)(a) if it affects the claimant's physical condition rather than his mental condition. Thus a distinction can be drawn between a psycho-neurotic disorder that produces symptoms such as pain or paralysis, directly impinging on the claimant's physical ability to move, and, say, agoraphobia or depression that affect the claimant's will to make use of such a physical ability. That is the distinction drawn by Mr Commissioner Walker QC in CSDLA/265/97, to which Mr Commissioner Jacobs referred. At paragraph 12 of his decision, Mr Commissioner Walker said:

> "They do not seem to have focused upon whether the symptoms – that is to say the pain suffered – was genuinely being suffered in the relevant muscles. If so, it is difficult to see how, whatever may have been the underlying cause of the pain which was and is restricting the claimant in walking, that restriction was not a physical disability."

The distinction is rational because it may be difficult to distinguish between the needs of those suffering from paralysis due to a non-organic process and those suffering from paralysis due to a severe physical injury of the spine, whereas the needs of those suffering from depression or phobias may be rather different and it may be more obvious that help within the scope of the care component may resolve their problems, rather than help with mobility.

12. However, it must be acknowledged that in *Harrison*, the Court of Appeal appear to have considered the ultimate cause of the disablement to be significant. Stocker L.J. said :

"The Commissioner, in the penultimate sentence of his decision, said:

> '... This does not mean that in every case of hysteria the medical authorities are bound to hold that a claimant's hysteria is not a manifestation of his physical condition as a whole; but it does mean that if they do so find it will be impossible to disturb their decision on the ground that they ought to have found it to be manifestation of the claimant's physical condition.'

That sentence seems to me to encapsulate the position and constitutes a refinement of the findings of the Medical [Appeal] Tribunal. Hysteria is not itself a physical condition, since physical and hysterical conditions are often used as contrasting terms, and in my view correctly so. The Commissioner points out, however, that where hysteria is itself a consequence of a physical condition, it is open to a Tribunal or Medical Board, as matter of medical opinion, to find that where hysteria is caused by a physical condition (for example due to pain due to some spinal condition), the inability to walk may itself be caused by that same physical condition. It may be, though we do not know, that it was on that basis, that is to say the basis of the psychiatrist's report, which was not before the Medical Board or the Medical Appeal Tribunal, to the effect that the hysteria was caused by pain caused by a physical spinal condition, that the adjudicator was persuaded to grant a mobility allowance for the future."

13. I am not entirely convinced that an ultimate physical cause is required as a matter of law, although the reality may be that hysterical conditions causing paralysis or pain usually arise as a consequence of physical trauma. In *Harrision*, the claimant's first unsuccessful argument was that the tribunal should not have determined the case without obtaining a psychiatrist's report. His second argument was that, even if his condition was hysterically based, it was still a manifestation of his condition as a whole. The Court of Appeal upheld the Commissioner's decision that that was a question of fact for the tribunal. Given the way the case was argued before the Court, their decision is unsurprising. What does not appear to have been argued is that the claimant's inability to walk more than a few yards, which he could manage with two sticks, was necessarily a reflection of his physical condition and that the question whether the underlying cause was hysteria or not was immaterial. It may be that the evidence that had been before the tribunal did not allow such an argument to be advanced and that there was, for instance, evidence of a more complicated psychiatric background. In any event, I do not consider the Court's decision to be inconsistent with CDLA/3966/97, even if the Court's decision does not actually support it.

14. Furthermore, as Mr Wilson submits, if the nature of the ultimate cause of the disablement is relevant, there was a physical cause in this case. The Secretary of State suggests that there must be a *continuing* physical cause, as in Stocker LJ's example of continuing pain due to a spinal condition, but I am not persuaded that a continuing cause is required. If an ultimate physical cause is required at all, I fail to see any rationale for distinguishing between the effects of an hysterical condition caused by continuing pain and the effects of an hysterical condition caused by trauma, the organic physical pain of which has subsided.

15. It may be observed that Stocker LJ used the word "condition" in the sense of a disorder from which a person suffers, while regulation 12(1)(a) uses it in the sense of the person's state of being. Like Mr Commissioner Walker in CSDLA/265/97, I have difficulty

seeing how pain or paralysis cannot be part of a person's physical condition even if they are induced by a mental disorder. That appears to have been the position of the examining medical practitioner who saw the claimant on 5 March 1998, as he was aware of the diagnosis but still regarded the claimant's disability to be entirely due to physical factors. Nor can I see any reason why Parliament should have wished to prevent a person like the present claimant, who has been more or less confined to a wheelchair for over thirteen years because he is unable or virtually unable to walk, from securing entitlement to a benefit designed to enable just such a person to pay for the costs of transport.

16. An appeal to a Commissioner lies only on a point of law and, in the absence of an error of law, a Commissioner cannot allow an appeal merely because he or she might consider a decision of a tribunal to have been against the weight of the evidence. In the present case, however, there is really no challenge to the tribunal's findings of fact. It is accepted that the tribunal were entitled to find that the claimant's virtual inability to walk was due to hysteria and that hysteria is a mental disorder rather than a physical disorder. The challenge made is to the tribunal's conclusion that it necessarily followed, as a matter of law, that the claimant was not entitled to the higher rate of the mobility component. In my judgment, the tribunal erred in law because the undisputed evidence was that the hysteria affected the claimant's physical condition by severely limiting the extent to which he could use his legs, and, therefore, the only conclusion they could properly have reached on the evidence before them was that the claimant's physical condition as a whole was such that he was virtually unable to walk.

17. Accordingly, I allow this appeal and give the decision the tribunal should have given, awarding the mobility component as well as the care component. The 1999 award of benefit falls to be superseded on the ground that it was erroneous in point of law (see regulation 6(2)(b)(i) of the Social Security and Child Support (Decisions and Appeals) Regulations 1999) because the Secretary of State plainly made the same error as the tribunal. The supersession is effective only from the date of the application (see section 10(5) of the Social Security Act 1998). I make the award effective to 16 June 2006, which appears to be what the Secretary of State was inviting the tribunal to do if they allowed the claimant's appeal (see doc 89). I could make it effective to 16 June 2003 and leave the Secretary of State to revise the decision in respect of the period from 17 June 2003 to 16 June 2006 under regulation 3(5A) of the Social Security and Child Support (Decisions and Appeals) Regulations 1999. However, the claimant might not have any way of challenging a refusal to revise short of an application for judicial review (see CDLA/4/03) and I do not consider that a determination on a renewal claim necessarily prevents a tribunal or Commissioner from extending the period of the award under appeal to them, where it is necessary to do so to do justice. However, as there cannot be two awards in respect of one period, the Secretary of State's decision must be treated as having lapsed (on the basis that the renewal claim has become unnecessary) and that payment under that decision must be treated as having been paid on account of the decision of the tribunal or Commissioner.

(Signed) **MARK ROWLAND**
Commissioner
31 March 2004
(corrected 22 April 2004)