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1. For the reasons given below this appeal by the claimant succeeds. In accordance with the provisions of section 34(4) and section 23(7)(b) of the Social Security Administration Act 1992 I set aside the decision of the disability appeal tribunal given on 11 February 1997. I refer the case to a completely differently constituted tribunal for a fresh hearing and decision. The tribunal is free to consider entitlement to all rates of both components of disability living allowance, but there is no evidence before me to enable a decision to be made that the claimant had been entitled to care component or to lower rate mobility component. Accordingly, I make no further reference to those matters.

2. The claimant was born on 3 July 1936. He has sensory impairment in the left leg, a disc prolapse, mild degenerative disease and difficulties with neck and back movements. On 2 October 1995 he claimed disability living allowance. This was refused by the adjudication officer on 27 October 1995. On 4 December 1995 the claimant requested a review of that decision. On 19 December 1995 a different adjudication officer reviewed the decision but confirmed it. On 20 March 1996 the claimant appealed to the disability appeal tribunal against the decision of the adjudication officer. The tribunal met to consider the matter on 11 February 1997 and confirmed the decision of the adjudication officer. On 9 May 1997 the claimant applied for leave to appeal to the Social Security Commissioner against the decision of the tribunal. The chairman of the tribunal granted leave to appeal on 3 July 1997. The adjudication officer now concerned with the matter opposes the appeal and supports the decision of the tribunal.

3. The claimant is entitled to higher rate mobility component of disability living allowance for any period throughout which he is suffering from such physical disablement that he is either unable to walk or virtually unable to do so (section 73(1)(a) of the Social Security Contributions & Benefits Act 1992). By virtue of regulation 12(1) of the Social Security (Disability Living Allowance) Regulations 1991 a person is to be taken to be 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."

4. In its findings of fact the tribunal recorded that the claimant takes a very low dose of painkillers daily. He had been offered more but had refused them because he had taken overdoses in the past. He also takes an anti-depressant tablet. The tribunal's reasons included the following:-

"The appellant is not unable to walk. He is not virtually unable to walk because, although the appellant is in discomfort when walking, the tribunal did not accept that his amounted to severe discomfort. The appellant takes a very low dose of painkillers and could safely take a higher dose which would relieve his pain. The tribunal did not accept that he never went out with his 2 young children. He walked in and out of the tribunal room at a normal pace using a stick. He did not appear to be in discomfort.

In summary if the appellant took more painkillers, he would not be in pain and would be able to walk without discomfort."

5. The claimant appealed to the Commissioner on the basis that it was wrong in law to rely on the suggestion that taking more painkillers would eliminate the discomfort. The adjudication officer appears not to have disputed this, but argues that the tribunal's decision was not based upon this point because the tribunal had already decided that the claimant, although in discomfort when walking, was not in severe discomfort. However, looking at the extract from the reasons which I have quoted, at the very least the reasoning was ambiguous and, more probably, the tribunal was relying on the point referred to in the claimant's grounds of appeal.

6. In my view, although the question of medication can be relevant to the credibility of the claimant and the severity of the effect of any disability, it is an error of law to find that a claimant is not in severe discomfort because he could take more or stronger medication that would remove the severe discomfort, unless the tribunal explains precisely why this would be a reasonable, safe and appropriate thing to do. In the present case, not only has the tribunal failed to do this, it appears to have given no consideration to the claimant's comments on medication.

7. For the above reasons, this appeal by the claimant succeeds.

(Signed) H Levenson
Commissioner

(Date) 24 September 1998