

SOCIAL SECURITY CONTRIBUTIONS AND BENEFITS ACT 1992

SOCIAL SECURITY ADMINISTRATION ACT 1992

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

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. This is an appeal by the claimant, with the leave of a Commissioner, against the decision of the disability appeal tribunal ("the appeal tribunal") given on 8th August 1995. For the reasons set out below, that decision is erroneous in point of law. I therefore set it aside and refer the case to another appeal tribunal for determination in accordance with my directions.

2. The claimant, who was born on 1st June 1942, is now 54. She is a married woman who, until about 1992, worked as a shop assistant. She suffers from osteoarthritis of the spine, hips and knees. This condition causes her pain and discomfort. She gave up work after falling a number of times.

3. It may be helpful if, at this point, I indicate some of the problems which, in her evidence before the appeal tribunal, the claimant said that her medical condition gave rise to. The new appeal

tribunal should, however, have regard to the actual evidence and should not treat what is said below as a comprehensive list either of her problems or, in relation to each of those problems, the particular difficulties encountered. They will also, for reasons which appear below, have to consider whether there has been a deterioration in her condition since about Christmas 1994. The new appeal tribunal should also take account of the fact that she is a heavy woman - the examining medical practitioner said she weighed 20 stones - and consider whether this exacerbates any of her problems.

(1) The claimant said that she was liable to fall suddenly without warning and required to be supervised at all times because of the danger of doing so.

(2) She said that walking was painful. Sometimes her back was so painful that she could not walk at all. Her balance was affected and she was subject to sudden falls. She could not prevent herself falling even when using a walking stick. She was liable to panic attacks and breathlessness and needed to be accompanied at all times in case she fell.

(3) Stairs presented a major problem, particularly as the lavatory at her home was upstairs. She needed help to enable her to climb the stairs.

(4) Her husband had to help her get into and out of bed. She needed to go to the lavatory on average about twice during the night and on each occasion her husband had to help her out of, and back into, bed. The time taken on each such occasion was about 10 minutes. Her husband also had to help her get into and out of the bath.

(5) She needed help dressing, putting on her stockings and shoes, cutting her toenails and washing her hair.

(6) She sometimes needed help getting out of a chair and had to be held, when helped up, until she had loosened up and got her balance.

(7) She said that she could not cook a meal because she could not stand for long, she could not manage heavy pans and she could not bend to the cooker.

4. On 2nd August 1994, the claimant made a claim for disability living allowance. On 14th September 1994, that claim was disallowed by an adjudication officer. The claimant sought, and was granted, a review of that decision carried out by a second adjudication officer. That adjudication officer gave her decision on 23rd January 1995. She declined to revise the earlier decision because she considered that the claimant was not entitled to either the mobility component or the care component of disability living allowance. The claimant appealed to the appeal tribunal. Her appeal was heard on 8th August 1995, on which occasion she was represented by Mr Michael Guy of the Durham Welfare Rights Unit. Mr Guy continues to represent her before me. The appeal tribunal unanimously dismissed the claimant's appeal and did so in respect of both components. She now appeals to a Commissioner on the grounds that the appeal tribunal's decision was erroneous in law. Her appeal is supported by the adjudication officer in submissions dated 28th February 1995.

5. The claimant's grounds are that there has been a failure to comply with what is now regulation 29(5) of the Social Security (Adjudication) Regulations 1995 (SI 1995/1801), which requires the chairman to record the appeal tribunal's decision in writing and to include in such record a statement of the reasons for the decision including findings on all questions of fact material to the decision. The claimant, supported by the adjudication officer, submits that there has been a failure to make findings in relation to an important aspect of her evidence. She told the appeal tribunal that she had "had a fall at Christmas [1994] and my condition has deteriorated since then". This was an important piece of evidence for a number of reasons. First, osteoarthritis is a degenerative condition and the examining medical practitioner who examined the claimant on 6th September 1994, had ended his report with the comment that deterioration was likely although he thought it would take place slowly and gradually. The

circumstances relating to this fall were not investigated by the appeal tribunal. The claimant weighs 20 stones. A fall by someone of that weight, in her fifties and suffering from osteoarthritis may have serious consequences. The new appeal tribunal should discover what happened and make appropriate findings. Secondly, the claimant gave a good deal of evidence as to how the deterioration increased her problems. For example, she now says that she requires more assistance than she previously did in going to the lavatory. She says that she now has to crawl up and down the stairs. She runs a knitting circle and previously said that she found knitting was "good for hands and fingers when I have to rest my legs and back because of the pain". She says that she can no longer knit. She also says that she can no longer chop and peel vegetables. She used to visit her mother on a dally basis to make sure that she was looking after herself but told the appeal tribunal that she had not been able to do so for some months before the hearing in August 1995.

6. The appeal tribunal failed to consider the question of deterioration and made little or no mention in their findings and reasons of the ways in which the claimant said the problems and difficulties had increased. The new appeal tribunal must investigate what she says about the deterioration in her condition and its effects upon her. Whether or not they accept her evidence on any particular point is a matter for them. However, they must make a finding, one way or another, on the question of whether there has been a deterioration and must consider the ways in which she says her way of life has been affected and record their decisions accordingly.

7. The claimant raises no further matters but the adjudication officer submits that there have been a number of other failures to comply with regulation 29(5). These are:

- (1) a failure to make findings of fact as to her propensity to fall (see paragraphs 13 to 15 of his submissions);

(2) a failure to make findings of fact as to the claimant's ability to walk (paragraph 17 of his submissions); and

(3) inadequate reasons to explain why the appeal tribunal considered that the claimant was not entitled to disability living allowance.

I accept the adjudication officer's submissions and agree that such failures amount to errors of law.

8. In this case, the osteoarthritis from which the claimant undoubtedly suffers causes her problems. I have already given brief details of some of the problems which, she says, her medical condition gives rise to. The new appeal tribunal should approach the matter by making a list of these problems, including the claimant's difficulties with walking, and then recording their findings of fact in relation to each such problem. It will greatly assist the appeal tribunal if the claimant or Mr Guy is able to supply such a list at the outset of the hearing. The appeal tribunal will then know what it should look out for when hearing the evidence. In approaching that evidence, regard must be had to what the claimant says and the appeal tribunal should, in the circumstances, treat the report of the examining medical practitioner with some caution. Quite apart from the fact that his report relates to the position in September 1994, there are a number of matters where what the claimant says about the practical difficulties she experiences may outweigh the views expressed in the report. The examining medical practitioner did not, after all, require the claimant to carry out all the activities on which he comments.

9. For example, an important matter is whether the claimant is able to cook a main meal for herself; see section 72(1)(a), Social Security Contributions and Benefits Act 1992. The claimant's evidence before the appeal tribunal was that she could not do so because she could not stand for long, was unable to manage heavy pots and pans and could not bend down far enough to put things in the cooker. The appeal tribunal said that her claim to be unable to cook a main meal for herself was "not supported by the clinical findings of the

doctors who have seen her". So far as I am aware, she was seen by only one doctor who, so far as I can see, indicated what was expressly stated to be an opinion by ticking a number of boxes on page 15 of his report. It is extremely unlikely that he actually saw the claimant carrying out any form of cooking activity in her kitchen.

10. Having made findings of fact, the next stage is to see whether those facts satisfy any of the conditions in section 72(1), Social Security Contributions and Benefits Act 1992, and if so which, and thus entitle her to the care component and, also, whether those findings which are relevant to her mobility satisfy any of the conditions in section 73(1) of that Act and regulation 12 of the Social Security (Disability Living Allowance) Regulations 1991 (SI 1991/2890) and thus entitle her to the mobility component. In relation to the care component, the new appeal tribunal should look in turn at each of the conditions set out in paragraphs (a), (b) and (c) of section 72(1) and record their decision in relation thereto and their reasons for that decision. Again, it will be helpful if the claimant or Mr Guy can indicate whether there are any of these conditions which are not relied on and thereby avoid the need to spend time considering that condition. In considering section 72(1)(b)(ii) - the requirement for continual supervision throughout the day in order to avoid substantial danger to the claimant or others - regard should be had to the matters and decisions referred to in paragraphs 13 to 15 of the adjudication officer's submissions dated 28th February 1995.

11. The findings of fact, so far as relevant, must also be considered in relation to section 73(1) of the 1992 Act. There is no suggestion that the claimant is mentally disabled. Accordingly, the relevant questions are whether :

(1) she is suffering from physical disablement such that she is either unable to walk or virtually unable to do so; or

(2) she is able to walk but is so severely disabled physically that, disregarding any ability she may have to use routes which are familiar to her on her own, she

cannot take advantage of the faculty out of doors without guidance or supervision from another person most of the time.

Regard should also be had to regulation 12(1)(a) of the 1991 Disability Living Allowance Regulations, which provide, in relation to the first question, that a person is unable, or virtually unable, to walk only in the following circumstances; namely:

"(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;"

(Sub-paragraph (b) of regulation 12(1) is not relevant for the purposes of this case.)

12. Since the claimant is not unable to walk, the new appeal tribunal will have to consider (ii) and (iii) of this provision. In decision R(M)1/91, Mr Commissioner Rice, at paragraph 6, quoted from an earlier, and unreported, decision of his own where he said:

"6. In the present case, I am concerned not with the claimant's ability to walk - it is accepted that he can do this within limits - but whether or not his walking performance is so poor that he can properly be regarded as "virtually unable to walk". The meaning of "virtually unable to walk" is, in my judgement, a question of law. As was said in paragraph 11 of Decision R(M)1/78:

'What "virtually unable to walk" means is a question of law, and in my view it means

unable to walk to any appreciable extent or practically unable to walk'.

This definition was adopted in Decision R(M)3/78 (paragraph 12). In other words, the base point is a total inability to walk, which is extended to take in people who can technically walk but only to an insignificant extent."

13. There are a number of points which the new appeal tribunal needs to consider with care. In her original claim form, the claimant said at page 5 that she could walk 50 yards in five minutes. In the form DLA 140 which she signed, she said with regard to her ability to walk:

"About 100 yards I can walk. I have to walk slow. I have to lean onto my husband. I cannot depend on walking stick. ... I take between 10-15 minutes to cover 100 yards."

The examining medical practitioner clearly did not see her walk anything like that distance because he said:

"In her statement, she says that she can walk 100 yards before the onset of severe discomfort. In my opinion, she would be able to do that."

He went on to say that she would take between 4 to 5 minutes to cover 100 yards and added "likely one halt for a minute". It is not clear where he got these figures from since the claimant had said 10 to 15 minutes. Before the appeal tribunal, the claimant estimated that she could walk 50 yards in five minutes assisted by her husband but that she could only walk a few steps unassisted. Later, in response to a question, she is recorded as saying "I said 100 yards to Examining Medical Practitioner but I had no idea how far it was". The new appeal tribunal must do their best to make findings as to the matters referred to in regulation 12(1)(a)(ii). The decision as to whether the claimant is virtually unable to walk is matter for the new appeal tribunal to take in the light of their findings. However, if the claimant can only cover 50 yards in five minutes (or 100 yards in 10 minutes) with the help of her husband serious consideration must be given as to whether she is virtually unable to walk. Progress at such a rate is so painfully slow as to amount to little more than shuffling. Most people could, literally,



crawl 50 yards in less than five minutes. Even if she can walk 100 yards in five minutes - which is still an extremely slow pace - the new appeal tribunal should consider how significant is her ability to walk. Regard must also be had to the words "without severe discomfort".

14. In a form which the claimant completed on 15th December 1994, she said, at page 2 that she liked to visit the countryside. Then, at page 9, she said:

"I enjoy walking in the country and watching birds and animals in the countryside but I have to get taxis or rely on relatives to take me as I cannot use public transport without great difficulty and pain".

The first part of that remark - "I enjoy walking in the country" - cries out for investigation because it is at a variance with much that the claimant has said elsewhere. There is no record of the claimant having been asked what she meant by that remark. However, the appeal tribunal relied on it when they came to make their findings of fact. To rely on such a remark, which was so obviously contrary to everything else that the claimant said, without giving her an opportunity to explain what she meant was a serious error. The new appeal tribunal must inquire what she means.

15. Finally, the new appeal tribunal must take care to express themselves in such a way as to make clear the reasoning behind the various conclusions which they must come to.

16. For these reasons I allow the appeal.

(Signed) J.P. Powell  
Commissioner

Dated: 17 OCT 1996