

CDLA/1361/1999

DECISION OF THE COMMISSIONER

1 I allow the claimant's appeal (brought by her mother as appointee) against the decision of the Kettering disability appeal tribunal on 12 November 1998. It was brought by leave of the chairman. The tribunal's decision was that the claimant is entitled to the highest rate of the care component (as awarded from 6 April 1992 to 17 January 2001) and the lower rate of the mobility component (as awarded from and including 17 January 1994) of disability living allowance but is not entitled to the higher rate of the mobility component. For the reasons given below, that decision is erroneous in law. I therefore set it aside. I substitute for that decision my own decision which is at paragraph 2.

2 My decision is that:

In addition to the award to the claimant of the highest rate of the care component of disability living allowance from and including 6 April 1992 to 17 January 2001, which is confirmed, the claimant is also entitled with effect from 8 January 1998 to the higher rate of the mobility component to 17 January 2001. This is in substitution from 8 January 1998 of the award of the lower rate of the mobility component from and including 17 January 1994, but the award of lower rate of the mobility component for the period before 8 January 1998 is confirmed.

Background to the appeal

3 This appeal comes on an application for leave granted by the chairman and supported by the adjudication officer now acting. The adjudication officer has invited me to make the decision under Schedule 6 to the Social Security Act 1998, that is, by an order without reasons but with directions to a new tribunal. I entirely agree with the comments as to the adequacy of the tribunal decision in this case, and it must be set aside as inadequate, as both parties invite me to decide. But it seems to me, given the narrow focus of the appeal and the considerable extra evidence now on file that it would be more expedient for me to deal with the matter directly by taking my own decision under section 34 of the Social Security Administration Act 1992. I do that also to ensure no break in the entitlement of the claimant to either the highest rate of the care component or the lower rate of the mobility component, neither of which are in dispute in this appeal.

4 Entitlement to the highest rate of the care component for the claimant, who was born in January 1989 and who is severely disabled by the cumulative effect of several severe and permanent problems, has not been in dispute. I confirm the decision of the adjudication officer, and that of the tribunal under appeal, awarding highest rate of the care component to 17

DWW

CDLA/1361/1999

January 2001. I need consider the matter no further for the purposes of this appeal: section 33(4) of the Social Security Administration Act 1992.

5 This appeal concerns only whether the claimant should receive the higher rate or the lower rate of the mobility component. Again, there is no dispute about the lower rate being awarded. What is in dispute is whether the cumulative effect of the claimant's conditions are such that she is, within the tests laid down by law in section 73(1) of the Social Security Contributions and Benefits Act 1992 and regulation 12 of the Social Security (Disability Living Allowance) Regulations 1991, "virtually unable to walk". In particular, the level of discomfort she suffers when walking or because of walking is put in issue. It is because there is no mention of the issue of pain or discomfort in either of the two tribunal statements said to constitute the full statement that its decision is set aside.

6 The review decision from which the appeal was made in this case was a decision of an adjudication officer on 7 May 1998. This refused to revise the earlier decision of an adjudication officer on 2 March 1998 which refused to award the higher rate of the mobility component, although it was accepted that the claimant now had difficulty in walking any distance. The claimant's appeal from that decision was received on 22 June 1998.

7 I mention those dates because the appeal was therefore brought after the passing of the Social Security Act 1998 on 21 May 1998, and the provisions of Schedule 6 therefore apply to it. In particular, paragraph 3(2) of that Schedule provides that:

The tribunal shall not take into account any circumstances not obtaining at the time when the decision appealed against was made.

In this case, therefore, the tribunal should have been concerned with the claimant's ability to walk in June 1998 and not (as it appears to have been at the tribunal) at the date of the tribunal hearing some months later. As my power to take a decision in substitution of that of the tribunal is a power "to give the decision which he considers the tribunal should have given" (sections 23(7) and 34(4) of the Social Security Administration Act 1992) that applies to my decision also.

The evidence

8 There is now a considerable amount of evidence in this case. I must be satisfied, to allow the appeal, that on the balance of probabilities the claimant's physical condition as a whole is such that her 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 she can make progress on foot without severe discomfort is such that she is virtually unable to walk (regulation 12 Social Security (Disability Living Allowance) Regulations 1991). I must also be satisfied that the condition existed for at least three months before any award starts and will last for at least six months.

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P.07/10

CDLA/1351/1998

9 I have reviewed all the evidence now on file (several items of which were not available to the tribunal, and most of which was not available to the adjudication officers) with a view to seeing if it is established that the claimant meets these conditions in June 1998. The claimant has Down's syndrome and resulting poor muscle tone. This is made worse by an imperforate anus. She also needed at an earlier stage a "hole in the heart" operation. Sadly, these are permanent conditions although clearly all concerned have been working to ease the claimant's situation as far as can be done. For the purposes of disability living allowance, if the conditions are met at the date of the requested review (the review request was received on 8 January 1998) and at the date of the review decision, then the evidence clearly suggests that the conditions were met for some time before that and will be met for the foreseeable future. In particular, I find that if the test is met for the period under review, then it is also met for the "before" and "after" periods required for entitlement.

10 The claimant's problems with walking arise acutely because of the interaction of her different conditions. The following evidence about this is now before me, in addition to the evidence before the tribunal. "If she walks more than 50 yards she is likely to soil herself" (letter from the MP, April 1999). "For sometime, it was assumed that soiling, which occurs regularly, was related to diet and/or psychological factors. I understand from [the claimant's mother] that the current medical opinion is that the soiling is due to physical factors, such that there is likely to be "leakage" whenever [the claimant] is upright and particularly if she stands or walks for even a short period of time. [The claimant] is an active girl and this is deeply distressing to her ... She is wilful and unpredictable; she is often in pain and she has significant emotional difficulties associated with bowel problems" (letter from the senior educational psychologist and area team leader, June 1999).

11 The medical diagnosis is confirmed in February 1999 by her consultant paediatrician, who is the director of child health at the main local hospital. That confirmation also comments: "She has an unusual problem which severely impairs her mobility ... It is made much worse by physical activity and if she walks more than fifty to one hundred yards she is very likely to soil herself ... she finds this extremely distressing and the tendency to soil makes her behaviour a lot worse and causes a lot of emotional upset." The parents commented that a member of the tribunal suggested that the claimant should be put in nappies (document 86, although the point is not in the record of proceedings). The consultant expressly rejects that suggestion as inappropriate. The consultant had earlier provided a letter of support placed before the tribunal, which included the phrase: "Although she has good leg power, she is not able to travel far under her own volition because of her problems with incontinence. This, combined with her developmental problems related to her Down's Syndrome, make mobility a major problem for the family."

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CDLA/1381/1998

12 Evidence before the tribunal included evidence from a former head teacher about "a great deal of problems with her bowels, soiling could be at times a daily occurrence ... she became very distressed at these time ...". Similar evidence came from the school nurse, employed by the local health trust. Her current head teacher at the special school she now attends comments: "Walking in and around town is likely to induce soiling for [the claimant]. For her to go in a buggy or wheel chair is age and physically inappropriate but she never the less need the experience." Another specialist at the local national health service trust adds: "I would certainly recommend that [the claimant] avoids walking distances. At her age it is now inappropriate to be using a buggy."

13 These independent views all confirm the direct evidence of the claimant's parents made before, to, and after the tribunal hearing. These include: "Walking causes [the claimant] to have severe cramp like pains which can last for a considerable amount of time and lead to uncontrolled and excessive defecation for up to 3 days" (document 86); "She knows that the pain will lead to loss of bowel control and is more reluctant to walk any distance ... Walking causes the collick (?) - type pain which comes when soiling is likely" (document 83, the tribunal's record of proceedings). I also note particularly the statements in the claimant's mother's original letter requesting a review explaining why the request was made when it was made and not before. I finally note that there has been no examining medical officer's report or other expert evidence which calls into question in any way this consistent set of statements of the claimant's problems from almost everyone who might be in a position to give an objective summary of the claimant's condition.

Severe discomfort

14 In the light of all this evidence, I agree with the claimant's mother's comment that the final sentence of the tribunal statement, that "the decision has also taken note of all information and reports in the appeal papers and in particular the Paediatrician's statement of [the claimant's] good leg power" is to take the statement out of its context and to rely on it while failing to deal with the point raised in the rest of the sentence. It is clear that the claimant can walk, and is physically capable of walking short distances. But all the evidence points to the fact that if she walks even the shortest distance, she suffers pain and she then loses control of her bowels. Further, that loss of control is total and may continue for some time. In addition to the pain, there is clear evidence that the claimant suffers acute embarrassment, emotional upset and distress from the fact she soils herself when she walks. She therefore does not want to walk and, given her other problems and her stubbornness, attempts to make her do so add to the distress.

DWT

CDLA/1361/1998

15 In my decision CDLA/12940/1996 (to be reported as R(DLA) 4/98 I made the following comments about the meaning of "severe discomfort":

12 "Pain" is a word encompassing a wide range of intensities. It is "a localised or diffuse abnormal sensation from discomfort to agony, caused by stimulation of functionally specific peripheral nerve endings" (Blackiston's Gould Medical Dictionary), or "a more or less localised sensation of discomfort, distress, or agony, resulting from the stimulation of specialised nerve endings" (Dorland's Medical Dictionary). "Discomfort" is not a term defined in medical dictionaries. It has been defined as "the condition of being uncomfortable; uneasiness" (Oxford English Dictionary). This may be the definition that the Commissioner had in mind in CM 1/81. In that sense, I respectfully adopt from the judgment of Glidewell LJ the guidance that "discomfort" describes the sensation experienced from lesser levels of pain. The medical definitions both also stress that the sensation of pain arises from a particular functional or physical source. As noted in R(M) 1/83, the sensation of discomfort might also arise from other causes. For example, in this case the sensation of discomfort experienced by the claimant when walking is due to pain in her knees, but may be made worse by the claimant becoming breathless. This is so although breathlessness may not itself directly cause pain.

13 How does "severe" qualify "discomfort"? A person who suffers severe discomfort is treated as being virtually unable to walk, and the severity of the discomfort is to be measured with this in mind. "Severe" is an evaluative term, which may be contrasted with moderate or mild, but is not open to precise definition.

My decision

16 Applying that approach to the facts of this claim, I have no hesitation in stating that this is clear evidence that the claimant is virtually unable to walk because even an insignificant amount of walking causes her severe discomfort both while it happens and after it has happened. The discomfort in this case comprises not only the pain but also the physical sensation of having soiled oneself in the ways described in the papers (which would certainly be "discomfort" in the ordinary sense of the word, though possibly not "severe"), the embarrassment of knowing that one has soiled oneself (which again would of itself cause discomfort), and the distress caused. Looking at all these elements together they are in my view of such a magnitude in this case that I conclude that walking to any extent causes the claimant severe discomfort after the walking if not during it (and often both). The claimant is therefore within the test in regulation 12 of the Social Security (Disability Living Allowance) Regulations 1991.

17 The award of the care component is in effect (subject to any review) until 17 January 2001 (the claimant's 12th birthday). A fixed term award seems the more appropriate award in this case, to allow for review as the claimant grows older, and I therefore adopt that date as the final date for the decision. The award is to start from the date that the review was first

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PAGE 15

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P.10/10

CDLA/1381/1999

requested, by the letter received on 8 January 1998. My decision giving effect to this decision is in paragraph 2.

18 The appointee should be aware that the higher rate of the mobility component will not be paid in full for past periods in addition to the payment of lower rate of the mobility component already received. The additional entitlement awarded by this decision for past periods is limited to the amount by which the higher rate of the mobility component exceeds the lower rate of the mobility component for each week during the period of award.

David Williams
Commissioner

19 August 1999

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