

CDLA/0217/2009

**DECISION OF THE UPPER TRIBUNAL  
(ADMINISTRATIVE APPEALS CHAMBER)**

**Decision**

1. **This appeal by the claimant succeeds.** In accordance with the provisions of section 12(2)(b)(ii) of the Tribunals, Courts and Enforcement Act 2007 I set aside the decision of the Social Entitlement Chamber (Taunton) of the First-tier Tribunal made on 21<sup>st</sup> November 2008 (reference 206/08/00655). I substitute my own decision. This is that the claimant is entitled to higher rate mobility component in addition to lowest rate care component of disability living allowance ("DLA") from 9<sup>th</sup> April 2008 to 8<sup>th</sup> April 2011.

2. I make a limited period award because I agree with the tribunal that it is not clear that the position will be unchanging. The end date should allow the claimant to make a renewal claim in good time, if that is appropriate, and for there to be full up to date medical reports at that time.

**Background and Procedure**

3. The claimant is a woman who was born on 11<sup>th</sup> November 1947. She had an industrial accident on 13<sup>th</sup> April 1992 and on 3<sup>rd</sup> August 1999 the Secretary of State assessed her as 22% disabled for life because of loss of faculty (musculo ligamentous injury to the neck). On 9<sup>th</sup> April 2008 she claimed DLA. In her claim form she referred to abdominal problems, frequent sudden attacks of diarrhoea, and fear of and actual incontinence. She also referred to difficulties caused by back pain. The Secretary of State obtained a report from the claimant's GP, in which the GP referred to "severe intestinal hurry".

4. On 24<sup>th</sup> June 2008 the Secretary of State refused to make any award of DLA and on 11<sup>th</sup> July the claimant appealed to the tribunal against that decision of the Secretary of State. The file includes a report prepared on 28<sup>th</sup> July 2006 for the purposes of an earlier claim for incapacity benefit, together with other evidence in relation to that claim, but in the present case the position has to be assessed as it was on the date of the decision under appeal to the First-tier Tribunal, (nearly two years later) and so that evidence is of limited help in the present appeal.

5. In a written submission to the tribunal the claimant's representative stated (pages 155 to 156 of the file):

"She suffers severe discomfort on walking, both physical pain from the damage to her neck and shoulder, abdominal cramps and bloating, and anxiety and distress caused by the very real prospect that she will soil herself (and of course the chafing and soreness once this has happened). She has constant pain in her back, which she describes as being "as if someone had put a barbed screwdriver in it and was turning it" ... Attacks of diarrhoea are sudden,

violent and without warning. She is unable to turn her head, but has to turn her whole body to look at something”.

6. The tribunal considered the matter on 21<sup>st</sup> November 2008 and awarded lowest rate care component from 9<sup>th</sup> April 2008 to 8<sup>th</sup> April 2011, but confirmed the decision of the Secretary of State in relation to mobility component. On 12<sup>th</sup> January 2009 the District Tribunal Judge refused to give the claimant permission to appeal to the Upper Tribunal. She now appeals by my permission given on 13<sup>th</sup> March 2009, when I indicated that the reasoning of the tribunal in relation to higher rate mobility component seemed to be muddled. The Secretary of State opposes the appeal and supports the decision made by the tribunal. I have no criticism of the decision made by the tribunal in respect of the care component of DLA, and the claimant seems not be challenging this in view of what I said when granting permission to appeal. I confine my remarks to the higher rate mobility component of DLA.

### The Relevant Law

7. Insofar as it is relevant, section 73(1)(a) of the Social Security Contributions and Benefits Act 1992 provides entitlement to higher rate mobility component of DLA if a person:

73(1)(a) ... is suffering from such physical disablement that he is either unable to walk or virtually unable to do so.

8. Section 12(8)(b) of the Social Security Act 1998 provides:

12(8) In deciding an appeal ... the ... tribunal

(a) ...

(b) shall not take into account any circumstances not obtaining when the decision appealed against was made.

9. Regulation 12(1)(a) of the Social Security (Disability Living Allowance) Regulations 1991 provides, so far as is relevant, that (my emphasis):

12(1) A person is to be taken to [be] ... virtually unable to walk only in the following circumstances –

(a) [her] physical condition as a whole is such that ... -

(i) ...

(ii) [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 he can make progress on foot without severe discomfort, that [she] is virtually unable to walk.

It is well established that any walking that is accompanied by severe discomfort must be disregarded.

### The Decision of the First-tier Tribunal

10. The basis of the decision in relation to higher rate mobility component was that the claimant could physically walk, sometimes fast, or even run, "discounting episodes of faecal urgency". It accepted the evidence to which I have referred above and found that (paragraph 35 on page 179):

"her incontinence was so voluminous that it could not be contained by incontinence pads".

However it did not accept that this was the position most of the time when walking out of doors, or that the anxiety and distress could amount to severe discomfort.

11. It seems to me that there are three problems with this reasoning. The first is that it does not take into account the degree to which the claimant limits her walking out of doors because of her physical problems. The second is that the tribunal suddenly switched from a discussion of the physical problems to a conclusion that the anxiety and distress could not amount to severe discomfort. The third is that the emphasised words in regulation 12 (see paragraph 9 above) seem not to have been taken into account.

### The Secretary of State

12. The Secretary of State relies on a series of extracts from various decisions setting out general principles which do not, in my view, point to a specific decision on the particular facts of this case.

### Conclusions

13. It seems to me that the decision of the tribunal was made in error of law for the reasons that I have indicated above and I set it aside. In the particular circumstances of this case, where the facts are largely uncontested and the issue is what conclusion is to be drawn from those facts, it is possible for me to make my own decision based on the evidence relating to the date of the decision of the Secretary of State. It seems to me that the evidence of the claimant together with that of the GP establishes that in practice it is probable that the claimant is, on the whole, virtually unable to walk without severe discomfort caused by physical factors. These factors include not only any referred or residual effect of her neck and back problems, but also the physical and muscular effort of trying to control her bowels and the very real effects of an episode of faecal incontinence, including discomfort, soreness and so on.

14. For the above reasons this appeal by the claimant succeeds to the extent indicated.

**H. Levenson**  
Judge of the Upper Tribunal

12<sup>th</sup> May 2009.