

THE SOCIAL SECURITY COMMISSIONERS

Commissioner's Case No: CDLA/849/1999

SOCIAL SECURITY ADMINISTRATION ACT 1992

SOCIAL SECURITY CONTRIBUTIONS AND BENEFITS ACT 1992

SOCIAL SECURITY ACT 1998

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

DECISION OF THE SOCIAL SECURITY COMMISSIONER

MR COMMISSIONER BANO

Claimant : [REDACTED]

Tribunal : [REDACTED]

Tribunal Case No : [REDACTED]

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. My decision is that the decision of the disability appeal tribunal given on 15 October 1998 is erroneous in point of law. I therefore allow the appeal and refer the case for rehearing by an appeal tribunal constituted in accordance with regulation 36 of the Social Security and Child Support (Decisions and Appeals) Regulations 1999.

2. This appeal arises out of a claim for disability living allowance made by the claimant on 12 February 1997. The claimant suffers from a degenerative disease of the lower spine and she stated in her claim form DLA1 that she could only walk a short distance before feeling severe discomfort and pain. In Part 2 of the form she further stated that the pain was so severe that it made her cry on occasions, and that it took her about 8 minutes to walk 100 yards. The diagnosis of spondylosis and degenerative disease of the lumbar spine was confirmed by the claimant's general practitioner in a report dated 7 March 1997.

3. On 2 April 1997 the claimant was examined by an examining medical practitioner. He reported that the claimant could walk 100 to 150 yards over pavement before the onset of severe discomfort and that it would take the claimant twice the normal time to walk that distance. He also stated that the claimant gradually came to a halt as the pain in her back increased and would then tend to rest for 4 or 5 minutes before proceeding. On the basis of that evidence, the adjudication officer decided on 10 April 1997 that the claimant was not unable to walk or virtually unable to do so for the purposes of section 73(1)(a) of the Social Security Contributions and Benefits Act 1992 and regulation 12(1) of the Social Security (Disability Living Allowance) Regulations 1991 and, since the claimant did not satisfy any other conditions of entitlement to benefit, he disallowed the claim. The claimant's application for a review of that decision under section 30(1) of the Social Security Administration Act 1992 was refused by a different adjudication officer on 30 May 1997 and the claimant appealed against that decision to the tribunal.

3. The tribunal dismissed the appeal. In their statement of facts and reasons, they stated that they accepted the summary of facts in box 5 of form DL4 and the reports of the general practitioner and examining medical practitioner. They referred to the examining medical practitioner's report as being independent and continued:

"The tribunal is supported in its decision by its own observations of the appellant.

She walked into the tribunal suite at normal speed, pulled up a chair, and sat in it without any apparent pain or difficulty. She reversed the process on leaving (smiling?).

We accept and confirm the decision of the adjudication officer."

The claimant appeals against that decision, with the leave of the Chairman, on the grounds that the findings of the tribunal are inadequate, that they attached excessive weight to their observations of the claimant, and that they failed to have regard to the claimant's condition as at the date of the hearing.

4. Although this appeal is not supported by the adjudication officer now concerned, I consider that those contentions are correct. Regulation 12(1)(a)(ii) of the

Social Security (Disability Living Allowance) Regulations 1991, which prescribes the circumstances in which a claimant is to be taken as unable or virtually unable to walk, requires consideration to be given to the distance over which or the speed at which or the length of time for which or manner in which the claimant can make progress on foot without severe discomfort. In addition to considering the distance which the claimant can walk before experiencing severe discomfort, it was also necessary in this case for the tribunal to consider the claimant's speed, her manner of walking, the effect on her of covering a particular distance and the length of time which it takes the claimant to recover. In a border line case such as this, it is particularly important to make detailed findings on those matters and the statement of facts by the adjudication officer refers only to the distance which the claimant can walk before experiencing discomfort, and the fact that she has good balance. The tribunal's findings, accepting the adjudication officer's summary of facts and the reports of the examining medical officer and general practitioner, disclose no findings on the other matters which it was necessary for the tribunal to consider in this case in order to decide whether the claimant was virtually unable to walk.

5. I also agree with the claimant's representative that the tribunal erred in the way in which they dealt with their observations of the claimant at the hearing. Despite the prohibition on physical examinations and physical tests by a disability appeal tribunal imposed by section 55 of the Administration Act (now extended to all tribunals, except in prescribed circumstances, by section 20 of the Social Security Act 1998), it was held in R(DLA) 1/95 that a tribunal is entitled to rely on ocular observation of a claimant. Observations of the claimant at an appeal hearing may raise relevant issues of fact, for example, in a case where a claimant who has been said always to need a walking stick enters the tribunal room unaided, and a tribunal is also entitled to have regard to the claimant's demeanour in assessing the claimant's credibility as a witness. However, a tribunal should, in my view, be very slow to attempt anything in the nature of a medical diagnosis on the basis of visual observations of a claimant unassisted by any physical examination. The way in which a claimant presents at a hearing may also be misleading for many reasons, and tribunals should be astute to ensure that no breach of natural justice occurs because of any failure to give a claimant an opportunity of dealing with findings which the tribunal is minded to make based on, or supported by, their own observations.

6. The tribunal's reliance on their observations of the claimant in this case gave rise to three errors. First, although it is apparent from their decision that the tribunal regarded their observations of the claimant as relevant to some disputed issue, they did not state in their decision what that issue was. It may be that their own observations of the claimant led the tribunal to reject the claimant's own account of her difficulties in walking, but they did not make such a finding and the relevance which the tribunal themselves attributed to their observations is therefore not apparent. Secondly, I agree with the claimant's representative that the way in which the claimant entered and left the tribunal room was almost completely irrelevant to any question which the tribunal had to decide. Although the claimant stated on her claim form that she could only walk a short distance before feeling severe discomfort and pain, it has never been part of her case that she feels pain after only two or three steps and regulation 12(1)(ii), in any case, is concerned with ability to walk out of doors. Thirdly, I consider that the tribunal acted in breach of the requirements of

natural justice by failing to give the claimant any opportunity to comment on the conclusions which they were minded to draw as a result of their observations of her in the tribunal room. The claimant in this case was therefore deprived of an opportunity of explaining to the tribunal how the way in which she entered the tribunal room and sat down was consistent with the difficulties in walking which she claimed. Although the word “smiling” is not clear in the manuscript statement of facts and reasons, any reference to the claimant smiling when leaving the tribunal room carries the risk that the claimant may have been led to believe that she lost her appeal because of the pleasant way in which she conducted herself at the hearing.

7. I also agree with the claimant’s representative that the tribunal failed to make sufficient findings with regard to the claimant’s condition as at the date of the hearing. The claimant’s examination by the examining medical officer took place some eighteen months before the appeal hearing, and there was evidence before the tribunal that the claimant’s condition had deteriorated since that date. Although the tribunal made no express finding with regard to the claimant’s condition at the date of the hearing, the adjudication officer now concerned relies on the reference by the tribunal to their observations of the claimant as an indication that the tribunal did consider the claimant’s condition as at the hearing date. In R(DLA) 1/95 the Commissioner upheld the tribunal’s reliance on their own observations of the claimant because that was only one of the matters to which the tribunal had regard in reaching their conclusion and I regard the tribunal’s reference to their own observations of the claimant as a wholly inadequate adjudication in relation to the issue of deterioration in the claimant’s condition down to the date of the hearing. I therefore uphold the appeal on this ground also.

8. I therefore allow the appeal and refer the case for rehearing before a tribunal constituted in accordance with regulation 36 of the Social Security (Decisions and Appeals) Regulations 1999. Since the appeal was made before 21 May 1998, the new tribunal should, subject to any fresh determination, apply the “down to the date of hearing” rule. The case is also subject to the former review provisions.

**(Signed) E A L Bano
Commissioner**

(Dated) 3 July 2000