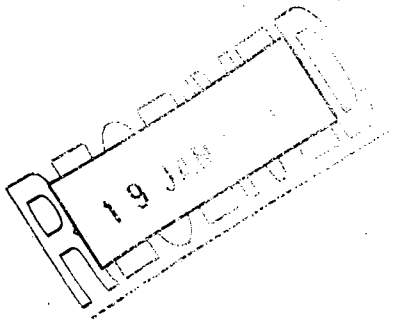
Oxfordshire Welfare Rights

Barton Neighbourhood Centre
Underhill Circus
Headington
Oxford OX3 9LS
Tel: (01865) 744165
Fax: (01865) 744704

CRO



Martin Barnes
Editor
Welfare Rights Bulletin
Child Poverty Action Group
1-5 Bath Street
London
EC1V 9PY

12th January 1998

Dear Martin

Commissioners Decision CSDLA/252/94 - Mobility Component

Enclosed copy of Decision CSDLA/252/94 from Commissioner Walker which I don't think has yet been summarized in Bulletin. (Apologises for poor quality of our copy of a copy.) Over recent months it has been our experience at DATs that Presenting Officers have been referring to a 50 yard limit on walking ability without referring specifically to this decision. However, we have finally managed to obtain a copy from a Presenting Officer. We understand it is also enclosed in the summary of decisions circulated to Tribunals.

Clearly the harshness of Commissioner Walker's decision will be of concern to all welfare rights workers and may need to be drawn to their attention.

Best wishes

Peter Turville
Oxfordshire Welfare Rights

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MMW HJD/T CH Commissioner's File: CDLA [illegible]/94

SOCIAL SECURITY ADMINISTRATION ACT 1992

APPEAL TO THE COMMISSIONER FROM A DECISION OF A DISABILITY APPEAL TRIBUNAL UPON A QUESTION OF LAW

DECISION OF SOCIAL SECURITY COMMISSIONER

1. This claimant's appeal fails. I find no error of law in the decision of the disability appeal tribunal dated 22 October 1993 such as to warrant my interference. The appeal is accordingly dismissed.

2. In June 1992 the claimant sought a disability living allowance. From the material provided in her application form it was clear that she was seeking only the mobility component. An adjudication officer determined that she did not satisfy the conditions therefore that she did not satisfy the conditions therefore and, in March 1993 another adjudication officer upon a review came to the same decision. (I note from his submission to the tribunal that he seems to have been under the impression that there had already been awarded the care component. I proceed upon the basis that that was incorrect largely because the claimant's representative before the tribunal is recorded as having stated that no care component was being paid and the presenting officer in opening stated that the mobility component alone was in issue.) The claimant appealed to the tribunal.

3. Entitlement to the mobility component of the allowance is governed by section 73 of the Social Security Contributions and Benefits Act 1992. There are two rates thereof. The higher rate is awarded to those who are suffering from physical disablement such that they are either unable to walk or virtually unable to do so (section 72(1)(a)) and the lower to those who are able to walk but are so severely disabled physically or mentally that, disregarding their ability to use familiar routes on their own, they cannot take advantage of their ability to walk out of doors without guidance or supervision from another person most of the time (section 73(1)(d)). One of the grounds of appeal appears to be to the effect that the lower rate does not seem to have been considered. I suspect that as matter of fact that is correct because the findings and reasons, such as they are, all appear to relate to the higher rate issues. Nonetheless I can see nothing in the evidence that required consideration to be given to the lower rate. Without some evidence being presented as to the need for guidance in the limited circumstances mentioned in sub-section ... there would not be anything to require the tribunal to investigate or consider the matter. Nonetheless I would for neatness and completeness at least have preferred that the tribunal specifically

mentioned the lower rate and why they did not feel they had to consider it. I do not think that that omission of form, however, amounts to an error of law in this case.

4. The test for the higher rate has been further refined and defined by regulation 12(1)(a) of the Social Security (Disability Living Allowance) Regulations, 1991. It provides three alternative or fully specified tests. One of them, of course, refers to actual inability to walk which is clearly not relevant to this case. The third concerns a rather specialised test that the actual exertion required to bring about walking would of itself, that is to say that exertion of itself, would constitute a danger to life or would be likely to lead to a serious deterioration in health. There was no evidence to suggest that either of these consequences was relevant to this case and so, although for similar reasons I would have preferred some short statement, that does not seem to me to amount to an error of law.

5. The test which was at the heart of this case concerned what is set out by DLA Regulation 12(1)(a)(ii). That requires that an individual'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, [means] that she is virtually unable to walk ..."

As the alternative to actual inability to walk it is necessary that the individual must be so limited in walking by the factors mentioned, or some one or more of them, before the onset of severe discomfort that in the normal sense of the English language, her "walking" amounts to a virtual inability to walk.

6. The evidence before this tribunal from the claim form - document 16 - was that the claimant, according to herself, could walk 30 yards in about 15 minutes before she felt that she was in severe discomfort. The restricting factor was pain and discomfort which, according to the medical evidence, stemmed from back pain, essentially coccygodynia. The evidence before the tribunal included also a statement to an examining medical practitioner - recorded in document 41 - that the claimant could walk about 100 yards on a good day but then had to stop because of back ache and pain. The doctor himself, at document 47, expressed the view that the claimant could indeed walk for 100 yards before the onset of severe discomfort albeit at a slow speed taking about 5 minutes. He opined that she would require to halt about half way due to back ache. His examination, he recorded, was on a good day whereas the claimant had two or three bad days a month.

7. By her letter of appeal, dated April 1993, the claimant said that she could only walk 15-20 yards without the pain in her back being unbearable. There was also lodged a medical report by an orthopaedic surgeon dated in January 1992 which, whilst it recorded the limitations on physical movement consequent upon damage to the back and the coccyx from a fall in August 1989 gave no direct evidence of a view about the claimant's walking ability. Under the heading "Present Condition" the surgeon recorded that the claimant said that she had discomfort on prolonged sitting

and also particularly on prolonged standing or walking so that her shopping activities were restricted. In the section headed "Opinion and Prognosis" he expressed the view that the claimant undoubtedly still had discomfort in her lower spine so that she was clearly uncomfortable when sitting for any length of time. He concluded that she was always going to be troubled with low grade low back pain which would be exacerbated with any prolonged activities such as prolonged standing or walking or prolonged stooping or lifting.

8. The tribunal chairman recorded in the note of evidence what appears to be largely a rehearsal by the presenting officer and the claimant's representative of what had already been put into evidence. It does not appear that the claimant herself gave direct evidence about the distance which she could walk before the onset of severe discomfort.

9. The tribunal's findings of fact were these:-

> "1 The appellant suffers from back pain and "coccydynia" [sic] causing low back pain which is increased by walking.
> 2 She is capable of walking distance of at least 100 yards without severe discomfort.
> 3 She is not virtually unable to walk."

They rejected the appeal giving as their reasons that -

> "1 [The consultant surgeon] in his report said that the appellant suffered from 'low grade low back pain'.
>
> 2 This will limit her ability to walk but not render her unable to walk or virtually unable to walk."

It is against that decision which the claimant now again appeals, late but with leave of a Commissioner.

10. The grounds of appeal, other than that already dealt with, are first that -

> "The notes of evidence given both by myself and my representative have not been fully translated to the findings of fact, particularly referring to the distance walked without severe discomfort."

It is, of course, not necessary that every item of evidence be focused positively or negatively in a finding of fact. As I have already noted the claimant does not appear to have given verbal evidence to the tribunal on this precise issue. The distances walked are recorded in the documents above referred to. The tribunal seem to have accepted the examining medical officer's assessment which itself is not out of line of the written statements of the claimant, other than that contained in her ground of appeal. I see no reason why they should not have accepted the common thread in that evidence albeit that it might have been preferable to explain why they were rejecting the later statement by the claimant. But that it was not repeated before the tribunal

may well have persuaded them to prefer the written evidence from the claimant which broadly was in line with the independent medical evidence.

11. The next ground of appeal is this -

> "The independent medical report gave considerable evidence about my condition yet the chairman and members of the appeal tribunal seemed to select only one comment re "low grade low back pain" without qualifying that remark with the continuing sentence which read as follows "low grade low back pain which will be exacerbated with any prolonged activity such as prolonged standing or walking or prolonged stooping or lifting"."

The tribunal were not concerned, directly at least, with the precise medical conditions afflicting the claimant although it would have been preferable had they made some brief finding that she was indeed suffering from the back pain about which there was no dispute. The lack of dispute, however, means that it is a matter which can be taken for granted and I would not have thought that it either made it difficult for the claimant to understand what the tribunal were saying or finding nor that it amounted to such an error of law as to require the decision to be set aside.

12 The next ground is that -

> "It is not clear form the decision why evidence has been accepted or rejected."

With the solitary exception of one part of the claimant's evidence, if that is what it truly was, in her letter of appeal there does not appear to have been such a conflict of evidence in this case as to require an indication that any had been rejected. Indeed as I read the note of evidence and the record of proceedings as a whole the tribunal effectively accepted all that which had been put before them.

13. There follows the point about the lower rate of the mobility component. The final point is that -

> "The findings of tribunal para. 1 refer to pain which is increased by walking yet that finding appeared to be given little weight in reaching the decision that I do not qualify for any rate of "Mobility Component"."

I am not sure that I follow what point of law is therein involved. The tribunal seem to have founded upon the consultant's assessment of the claimant's constant back state as one of low grade low back pain. They made a finding of fact that that, as indeed is contained in the fuller part of the consultant's report just quoted is increased by walking. But the question was at what point it could or would amount to severe discomfort. The tribunal found that the claimant could walk at least 100 yards before that stage was reached. Upon the evidence as already rehearsed that was a conclusion to which, in law at least, they were entitled to arrive. It is not one with which I can interfere. Equally the stage at which a low grade pain has been exacerbated so as to amount to severe discomfort is very much a matter for the judgment of such a body as the appeal tribunal who are accustomed to assessing just such issues. I have already

noted that the claimant does not appear to have given verbal evidence on the matter and her representative, as I understand the chairman's note of evidence, focused on the fact that the 100 yards ability was on a good day whilst the examining medical officer referred to 50 yards before a stop at a slow speed with a shuffling gait. But none of that seems to me to necessarily involve any contradiction so that the tribunal were free to record as their finding what was largely common ground. Nor, I may add, am I persuaded that any of the evidence just referred to affected the speed, length of time or manner to such an extent that it required any specific finding thereon, nor cumulatively as producing a "virtual inability" to walk. Nonetheless, I would have been happier had the tribunal themselves given some such explanations in respect of the matters which were at least contained within the evidence.

14. It will be seen that I do not entirely approve of the extent to which the tribunal made their findings and expressed their reasons. Nonetheless I am not satisfied that there is involved therein such an error of law so to require in effect the case to be sent back to another tribunal. As the evidence was presented to the tribunal and as I have rehearsed it above, it seems to me that there was little room for any decision other than that which they made. If somebody can walk even 50 yards, albeit slowly and with a limp, and even if a rest is involved, before the onset of severe discomfort that a person can not, in my judgment and as made clear in law be "virtually unable to walk". If, on the other hand, and as maybe the position here having regard to the age of this case, the claimant's condition has deteriorated then she should already have lodged, or maybe should now lodge, a fresh application.

15. For the reasons set out above this appeal is not allowed.

(signed) W M Walker
Commissioner
Date: 14 May 1996