

Bulletin 191

[SHERIFF]

THE SOCIAL SECURITY COMMISSIONERS

Commissioner's Case No: CSDLA/313/05

SOCIAL SECURITY ACT 1998

APPEAL FROM THE APPEAL TRIBUNAL UPON A QUESTION OF LAW

COMMISSIONER: D J MAY QC

Oral Hearing

DECISION OF SOCIAL SECURITY COMMISSIONER

1. My decision is that the decision of the appeal tribunal given at Glasgow on 20 January 2005 is erroneous upon a point of law. I set it aside. I remit the case to a freshly constituted appeal tribunal for a rehearing.
2. This appeal came before me for an oral hearing on 7 October 2005. The claimant was represented by Mr Orr, a welfare rights officer of the City of Glasgow Council. The Secretary of State was represented by Mr Bartos, Advocate, instructed by Mr Crilly, Solicitor, of the Office of the Solicitor to the Advocate General.
3. The claimant, who was born on 25 April 1989, has appealed to the Commissioner against the decision of the tribunal which was that she was not entitled to either component of disability living allowance with effect from 10 April 2004. The appeal before me related to the decision in respect of the lowest rate of the care component and the higher rate of the mobility component.
4. Both parties were agreed that the tribunal erred in law in relation to its treatment of the lowest rate of the care component. I am also so satisfied. The tribunal appear to have contradicted themselves in respect that in paragraph 3, the tribunal found that the claimant was able to deal with all her care needs on her own without anyone's help. However, in paragraph 6 they appear to accept that she had some reasonable requirements. In the light of that inconsistency the decision must be set aside on the basis of an error in law. That is sufficient to dispose of the appeal.
5. The principal area of argument before me related to the higher rate of the mobility component and the tribunal's findings in paragraph 3:

“...The weakness and deformity in her left leg is likely to be the cause of falls. This could be alleviated by the use of a walking stick. The appellant, a teenage girl, does not wish to use a walking stick. ...”.

And in paragraph 5:

“...with the use of a walking stick, which she stated she was embarrassed to use, she could clearly alleviate the problems with falls. ...”.

Mr Orr could not recall with any degree of accuracy as to whether the argument which was placed before me in relation to the higher rate of the mobility component was one which was focused before the tribunal adequately. It is therefore difficult for me to reach any conclusion as to whether, in relation to the higher rate of the mobility component, it could be said that the tribunal erred in law. The matter is however of no consequence in respect that the case is to be reheard by a freshly constituted tribunal. In these circumstances, the issue which was raised before me in relation to the use of a walking stick by the claimant, is one in respect of which I can and will give directions to the freshly constituted tribunal.

6. Mr Orr made it clear to me that the issues in the case related to the higher rate of the mobility component and the lowest rate of the care component, day time attention condition

only. Accordingly in light of that, I direct the tribunal that these elements of these components are the only ones in issue before them.

7. Section 73(1)(a) of the Social Security Contributions and Benefits Act 1992 provides as follows:

“73(1) Subject to the provisions of this Act, a person shall be entitled to the mobility component of a disability living allowance for any period for which he is over the relevant age and throughout which –

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

...
(5) Subject to sub-section (4) above, circumstances may be prescribed in which a person is to be taken to satisfy or not to satisfy a condition mentioned in sub-section (1)(a)... above”.

Such regulations are contained in the Social Security (Disability Living Allowance) Regulations 1991. These, so far as material to this case, provide:

“12(1) A person is to be taken to satisfy the conditions mentioned in section 73(1)(a) of the Act (unable or virtually unable to walk) only in the following circumstances –

(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 –

...
(ii) his ability to walk out of doors is so limited, as regards the distance over which or the speed of 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;

...
(4) Except in a case to which paragraph (1)(b) applies, a person is to be taken not to satisfy the conditions mentioned in section 73(1)(a) of the Act if he –

...
(b) would not be unable or virtually unable to walk if he wore or used a prosthesis or an artificial aid which is suitable in his case.”

8. Both parties were in agreement that I should direct the tribunal to consider whether the claimant satisfies the conditions contained in section 73(1)(a) and regulation 12(1)(ii) disregarding any artificial aid such as a walking stick. They were also in agreement that if the tribunal reached a negative conclusion on that issue, the claimant would not satisfy the condition. If, on the other hand the tribunal came to an affirmative conclusion on that issue, they would then require to consider regulation 12(4)(b) in relation to the use by the claimant of a walking stick. If they considered that the regulation applied, then she would not satisfy the conditions for the allowance and the conditions contained in regulation 12(1) would not be fulfilled.

9. The parties however were in disagreement in relation to whether the embarrassment of using a walking stick could be encompassed within the discomfort referred to in regulation 12(1)(a).

10. Mr Orr's submission was that the feelings of embarrassment in the use of a walking stick are relevant in assessing severe discomfort for the purposes of regulation 12(1)(a). He relied in that regard on R(M) 1/88. His submission was dependent upon the obiter view expressed by amongst others, Lord Justice Stocker, where he said:

"The Commissioner points out, however, that where hysteria is itself a consequence of a physical condition, it is open to a tribunal or medical board, as a matter of medical opinion, to find that where hysteria is caused by a physical condition, (for example pain due to some spinal condition), the inability to walk may itself be caused by that same physical condition".

He also relied upon what was said by Mr Commissioner Williams in CDLA/1361/1999 where at paragraph 16 he said:

"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".

11. Mr Bartos on the other hand submitted that the direction I should give is that a proper application of regulation 12(1) in circumstances both without the use of an artificial aid such as a walking stick or with such an artificial aid is that only the physical condition of the claimant 'as a whole' is to be taken into account. It was his submission that embarrassment caused by the use of a walking stick was not relevant to the claimant's "physical condition as a whole". He invited me to make a direction along these lines. He submitted that the claimant's feelings were not a physical condition. He submitted that when Mr Commissioner Williams said that the embarrassment of knowing that one had soiled oneself and the distress caused were factors to be taken into account in assessing severe discomfort he should not be followed.

12. I am persuaded by Mr Bartos' submission and do not accept that of Mr Orr. The crucial words in the statutory provision are "his physical condition as a whole". The feelings of the claimant about the use of a walking stick are not encompassed within these statutory provisions. I do not consider that R(M) 1/88 assists the claimant. In that case the basis of the decision was that the hysteria was functional, and accordingly it was not to be taken into account. The other comments which I have quoted above were obiter and in any event would depend upon hysteria being caused by a physical condition. I also accept what Mr Bartos said in relation to CDLA/1361/1999 in respect that the Commissioner did not appear to apply the regulation in the context of the words "his physical condition as a whole". In these circumstances I direct the tribunal to apply the statutory conditions in the manner indicated above.

13. The appeal succeeds.

(Signed)
D J MAY QC
Commissioner
Date: 10 October 2005