Bulletin 181

THE SOCIAL SECURITY COMMISSIONERS

Commissioner's Case No: CSDLA/504/03

SOCIAL SECURITY ACT 1998

APPEAL FROM THE APPEAL TRIBUNAL UPON A QUESTION OF LAW

COMMISSIONER: D J MAY QC

Oral Hearing

Appellant:

Respondent: Secretary of State

Tribunal: Ayr

Tribunal Case No:

DECISION OF SOCIAL SECURITY COMMISSIONER

1. On 1 December 2003 I granted leave to appeal in the application by the claimant for leave to appeal on a question of law from the decision of an appeal tribunal dated 15 May 2003. My decision is that the decision of that tribunal is not erroneous upon a point of law. The appeal fails. I dismiss it.

2. This appeal came before me for an oral hearing on 4 March 2003. The claimant was represented by Mr Dalton, Welfare Rights Officer with East Ayrshire Council. The Secretary of State was represented by Mr Brodie, Advocate, instructed by Mr Crilly, Solicitor, of the Office of the Solicitor to the Advocate General.

3. The claimant has appealed to the Commissioner against the decision of the tribunal, which found that the claimant was not entitled to an award of the mobility or care components of disability living allowance from 8 August 2002. The grounds of appeal were related to the mobility component only. In granting leave to appeal, I indicated that I wished to be addressed on the effect of *Moyna v Secretary of State for Work and Pensions* [2003] 4 All ER 162 in relation to the approach that is required of tribunals in applying the statutory conditions for the higher rate of the mobility component of disability living allowance and the approach to be taken by appellate jurisdictions, such as the Commissioners, in determining appeals from tribunals.

4. On this issue, it was Mr Brodie who gave the principal submission. Before dealing with *Moyna*, Mr Brodie reminded me of the terms of the legislation in relation to higher rate mobility. S.73(1)(a) of the Social Security (Contributions and Benefits) Act 1992 provides:-

> "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 in which he is over the age of 5 and throughout which
>
> (a) he is suffering from physical disablement such that he is either unable to walk or virtually unable to do so; ...."

He then referred me to regulation 12(1)(a)(ii) of the Social Security (Disability Living Allowance) Regulations 1991. They provide that:-

> "12(1) A person is to be taken to satisfy the conditions mentioned in s.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 the 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 at 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; ..."

Mr Brodie submitted that the use of the word "virtually" imported a very high degree of disability. Secondly, he submitted that whether a claimant is virtually unable to walk is assessed having regard to the factors set out in regulation 12(1)(a)(ii) and that these are primarily questions of fact. These facts have to be determined in order to decide the question as to whether a claimant is virtually unable to walk. Thirdly, he submitted that the legislation did not specify circumstances as to what is meant by "virtually unable to walk". By that he meant that it does not lay down any distance short of which virtual inability to walk would be established, such as a hundred yards, or a distance combined with the time, such as a mile and thirty minutes, from which the same conclusion would be drawn. It was his submission that the tribunal had to reach an impressionistic conclusion on the facts found by them in their fact-finding capacity. Mr Dalton did not dissent from these propositions and I accept them, but observing that all the factors referred to in sub-paragraph (ii) of regulation 12(i)(a) may not be in issue in every case.

5. Mr Brodie then took me through the speech of Lord Hoffmann in *Moyna*, which was the leading speech in the House of Lords, and in respect of which the other members agreed. Mr Brodie submitted that *Moyna* was concerned with the care component and, in particular, the conditions for the allowance set out in s.72(1)(a)(ii) (the cooked main meal condition). Mr Brodie directed me to paragraph 17 of the report in which, in respect of that test, it was said:-

> "It is a notional test, a thought experiment, to calibrate the severity of the disability."

Mr Brodie submitted that the higher rate mobility component was not a notional test and in that regard I think he is right.

6. However, Mr Brodie asked me to note the conclusion contained in paragraph 18 of the report. There, Lord Hoffmann said in respect of the cooking test:-

> "It involves looking at the whole period and saying whether, in a more general sense, the person can fairly be described as a person who is unable to cook a meal. It is an exercise in judgement rather than an arithmetical calculation of frequency."

7. It was Mr Brodie's submission that the approach to s.73(1)(a) was a similar one. It was his submission that the provision did not set down particular parameters but involved the fact-finder exercising a judgement.

8. In respect of such a judgement being constrained by the operation of law, Mr Brodie then referred me to paragraph 20 of the report, where Lord Hoffmann says:-

> "[20] In any case in which a tribunal has to apply a standard with a greater or lesser degree of imprecision and to take a number of factors into account, there are bound to be cases in which it will be impossible for a reviewing court to say that the tribunal must have erred in law in deciding the case either way (see *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* [1983] 2 All ER 737 at 743, [1983] 2 AC 803 at 815-816). I respectfully think that it was unrealistic of Kay LJ to think that he was able to sharpen the test to produce only one right answer. In my opinion the commissioner was right to say that whether or not he would have arrived at the same conclusion, the decision of the tribunal disclosed no error of law."

9. It was his submission that, in the instant case, the effect of that passage, was that, on the findings made in finding in fact 5, the judgement as to whether the condition was satisfied could have been decided by the tribunal either way. It was his submission that to reduce the application of facts to a formula in the manner the Court of Appeal did in *Moyna* would be wrong following upon the House of Lords' view.

10. Mr Brodie then went on to submit that, once a decision had been made by a tribunal, *Moyna* dealt with the circumstances in which an appellate jurisdiction could interfere. It was his submission that, following the decision in that case, the question as to whether the claimant is virtually unable to walk is a question of fact. However, an error in law may arise in the circumstances set out in paragraph 25 of the report of Lord Hoffmann's speech, where he said:-

> "What this means in practice is that an appellate court with jurisdiction to entertain appeals only on questions of law will not hear an appeal against such a decision unless it falls outside the bounds of reasonable judgment."

11. I did not understand Mr Dalton's dissent from Mr Brodie's submission which I have outlined in paragraphs 5 to 10 and I accept it in relation to the nature of the test of virtual inability to walk, how it is to be applied and the restrictions on an appellate jurisdiction in respect of interference with the judgement of the tribunal. I consider that it clearly and accurately sets out the position following the decision in *Moyna*. However, it should be noted what I say in paragraph 16 about the conclusion which could properly be drawn from finding in fact 5.

12. The finding of fact upon which the tribunal made their decision in this case is as follows-

> "5. The appellant can walk up to 350 metres on flat ground before the onset of severe discomfort, thereafter she may have to stop briefly to take her inhaler but she can continue after only a brief stop. Her gait and balance are normal and she would take about 3 minutes to complete the distance ... "

The evidential basis for that finding was the acceptance by the tribunal of the evidence of the EMP to that effect, though it is to be noted that the tribunal made no finding that the speed was normal. The EMP gave evidence to that effect. The EMP's evidence was as follows:-

> "a) Over what distance and terrain would the customer be able to walk **before the onset of severe discomfort (if any)** ?
>
> *'The customer is, in my opinion, based on examination and observations, able to walk 300 - 350 meters on the flat ground.'*
>
> b) What is the likely speed of walking (brisk, normal, slow, very slow)?
>
> *'Normal'*
>
> c) How long would it take the customer to walk the distance at (a)?
>
> *'About 3 minutes'*

d) Give details of any likely halts and state the frequency, reason for and duration of the halts expected.

'She doesn't need to halt if walking up to 350 meters on the flat ground.'

e) Describe the gait (e.g. limping, staggering, weight bearing on one or both legs, hemiplegic).

'Normal'

f) Describe balance while walking.

'Normal'

g) Describe any help with physical support that would be needed from another person when walking outdoors.

'No support from another person is necessary.' "

13. Mr Dalton, submitted that the EMP's evidence demonstrated that the claimant could not walk at a normal walking pace and it was that which made the conclusion based on the EMP's report fall outwith the bounds of a reasonable judgement. He said, under reference to anecdotal evidence from him about treadmill tests, that the walking pace of the claimant was not normal. He relied upon what was said by Commissioner Heggs in CM/145/88 in support of his proposition that the tribunal erred in law. The passage which is pertinent is in paragraph 3, where she said:-

> "Regulation 3(1)(b) of the Mobility Allowance Regulations 1976, as amended, clearly imports that a person may be found to be virtually incapable of walking if his ability to walk out of doors is limited in one or more of the various ways mentioned in that regulation in making progress on foot without severe discomfort. Accordingly it was incumbent on the MAT to record findings of fact on <u>each</u> of the factual tests in regulation 3(1)(b). The tribunal recorded that the claimant walked 90 yards 'very slowly'. He told them he could only walk 'about 5 minutes'. Assuming it took the claimant five minutes to walk 90 yards, it would take him more than 1½ hours to walk a mile – about 4½ times as long as a normal person, assuming, of course, the claimant could keep up the pace. In my view this is so slow as to be arguably paramount to virtually unable to walk. The MAT gave no explanation as to why they did not consider it to be sufficiently slow to satisfy the medical conditions for an award of mobility allowance. Further, regulation 3(1)(b) refers specifically to 'his ability to walk out of doors ..'. The MAT recorded that they saw the claimant walking 'along the tribunal corridors' and there is no indication that they assessed the claimant's walking ability in the context of his walking out of doors."

He submitted that that passage demonstrated that the judgement of the tribunal was unreasonable.

14. Mr Brodie, on the other hand, submitted that Commissioner Heggs had determined the case on the basis of a failure to set out adequate reasons for reaching that conclusion, rather than making a proposition in law. It was his submission that, in any event, one could place no reliance upon it as a proposition in law. It was inconsistent with the legislation and did not fit with the approach set out in *Moyna*. It was his submission that the proper

approach was anticipated by Commissioner Rowland in CDLA/717/98. Commissioner Rowland said in respect of CM/145/88 that:-

> "In that case, the tribunal do not appear to have made any finding as to the amount of time it in fact took the claimant to walk the 90 yards they saw him walk and the Commissioner allowed the appeal on the ground of inadequacy of reasons, rather than on the ground that the decision was one that no tribunal, properly instructed as to the law, could reasonably have reached. In the present case, the tribunal did make findings of fact on all the relevant factors and, in paragraph 5 of their decision (which I need not set out here) they gave clear reasons for those findings. Their decision cannot be criticised on the ground of inadequacy of reasons."

Then Mr Brodie referred me to paragraph 5 where the Commissioner said:-

> "An appeal to a Commissioner lies only on a point of law. I accept that, ultimately, the question whether facts found by a tribunal are capable of supporting a conclusion that a claimant is not virtually unable to walk is a question of law and that an error of law will be shown if, on the facts they have found, a tribunal have reached a conclusion that is wholly unreasonable. However, it is not for a Commissioner to attempt to lay down a precise formula for determining whether or not a claimant is unable to walk when the legislation does not do so. The legislation allows adjudication officers and tribunals a margin of appreciation. It is possible that not every tribunal would have reached the conclusion that someone with the present claimant's limited walking ability was not virtually unable to walk. I do not consider that a tribunal concluding that the claimant was virtually unable to walk would have erred in law but, equally, I can detect no error of law in the present tribunal's decision. The question whether the claimant was virtually unable to walk was a matter for the judgement of the tribunal and, this being something of a borderline case, they were entitled to decide it either way provided they had regard to the relevant factors."

Mr Brodie did point out to me that what Commissioner Rowland said was not entirely consistent with what was said by Lord Hoffmann, in respect that Lord Hoffmann had indicated that the question of whether a claimant is not virtually unable to walk is a question of fact rather than law. It was also his position that the concept of "margin of appreciation", which appears to have strayed from the parlance of human rights law, did not reflect the position as set out by Lord Hoffmann in paragraph 20 in relation to the absence of the necessity for the same conclusion to be reached by different tribunals on the same facts.

15. It was Mr Brodie's submission that the conclusion reached by the tribunal could not be said to fall outwith the bounds of a reasonable judgement on the facts found. He referred me to the examining medical practitioner's (EMP's) report which was the factual foundation for finding in fact 5 at pages 47 and 58. At page 47 there was the claimant's own description of her walking ability and at page 58 and 59 the evidence given by the EMP in respect of her walking ability which is set out above.

16. I have reached the conclusion that it has not been demonstrated by the claimant to my satisfaction that the decision of the tribunal fell outside the bounds of a reasonable judgement. The tribunal accepted that there was a limitation in the claimant's walking due to her disability and made findings in respect of the material matters contained in the legislative

provisions. Even if it were accepted that her disabilities in respect of the length of time to walk the distance were not normal, as expressed by the EMP, I do not consider that, of necessity, this undermines finding in fact 5 which makes no reference, as the EMP did, to the speed being normal. It is in reaching that conclusion difficult to articulate the basis for my view much further than to say that the decision made by the tribunal on the finding was well within the ambit of a reasonable judgement in the context of the high test, which includes the word "virtually". Finding 5 seems to me to fall well outwith the description of virtual inability to walk. Mr Dalton also referred me to some adminicles of evidence referred to in relation to evidence of the claimant's walking in central Ayr. I do not consider that these matters are material to the issue, as there was a factual basis for the judgement of the tribunal based on the EMP's report.

17. I have dealt with this appeal at some length, as I consider that the approach of the House of Lords in *Moyna* does impact on the way in which appeals in respect of disability living allowance are dealt with generally and, in the particular, in the context of this case, on the higher rate of the mobility component. As can be seen, although the basis of the decision of the Commissioner in CM/145/88 was not on the basis of a positive assertion as to what constitutes virtual inability to walk. There has been a tendency for those presenting appeals by claimants to tribunals and the Commissioners to rely on decisions such as CM/145/88 as setting out authoritative formulae by which the statutory provisions are tested against the facts of a particular case. I consider that *Moyna* demonstrates the error of the use of such authorities in that way. Mr Dalton approached the authority as though it laid down a standard as to what would constitute a reasonable judgement. Authorities such as CM/145/88 cannot be used to test whether a decision of the tribunal is outwith the bounds of reasonable judgement. In cases where a decision has been made outwith the bounds of reasonable judgement, I consider that this will be plainly and clearly obvious to the appellate jurisdiction. That the opposite is the position in this case, is equally clear and obvious. In any event, the expression by Commissioner Heggs in CM/145/88 that the walking pace in that case was so slow it would be "arguably paramount to virtually unable to walk", would not have been sufficient to found an error in law because, if it was only arguable, then it follows that a conclusion to the opposite effect cannot *per se* be unreasonable: it is only different.

18. The appeal fails.

(signed)
D J MAY QC
Commissioner
Date: 10 March 2004