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THE SOCIAL SECURITY COMMISSIONERS

Commissioner's Case No: CSDLA/667/02

SOCIAL SECURITY ACT 1998

APPEAL FROM THE APPEAL TRIBUNAL UPON A QUESTION OF LAW

COMMISSIONER: L T PARKER

Oral Hearing

Appellant:

Respondent: Secretary of State

Tribunal: Edinburgh

Tribunal Case No: U/05/091/2002/01484

DECISION OF SOCIAL SECURITY COMMISSIONER

1. The decision of the Edinburgh appeal tribunal (the tribunal) held on 25 June 2002 is not in error of law. The decision therefore stands.

The main issue

2. In CSDLA/678/99, a decision of Mr Commissioner Walker QC made with the consent of the parties under regulation 28(2) of the Social Security Commissioners (Procedure) Regulations 1999, the Commissioner directed the new tribunal as follows in paragraph 4 thereof:-

> "They will also note that it is at the onset of severe discomfort that the general ability to walk out of doors is to be tested; that true pain is something more than severe discomfort and that the latter may onset and then be relieved by rest so that a further distance can be walked before a further onset. In such a case the test stops at the first onset."

3. The appellant's representative submitted to the tribunal that these comments set out the correct test. However the tribunal preferred CDLA/805/94 and CDLA/4388/99, which it read as directing consideration also to the circumstances after the onset of severe discomfort. The tribunal took the view that episodic halts by the claimant do not necessarily bring the test to an end but merely require the tribunal to have regard to those halts in the overall assessment, which also takes account of the time, distance, speed and manner of walking and any severe discomfort experienced.

4. The ground of appeal to the Commissioner for which leave was granted by the District Chairman, is that the tribunal applied the wrong test in looking beyond the first onset of severe discomfort. I directed an oral hearing.

The statutory criteria

5. *Social Security Contributions and Benefits Act 1992*

> "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 ..... throughout which –
> (a) he is suffering from physical disablement such that he is either unable to walk or virtually unable to do so;
> .....
> (5) ..... circumstances may be prescribed in which a person is to be taken to satisfy or not to satisfy a condition mentioned in (1)(a)..... above.
> ....."

6. *Social Security (Disability Living Allowance) Regulations 1991*

> "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.....
> .....
> (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 the time for which or the manner in which he can make progress on foot without severe discomfort, that he is virtually unable to walk;
> ....."

The oral hearing

7. The case came before me for an oral hearing on 20 February 2003. The appellant was represented by Mr Andrew Little, a Welfare Rights Officer with the Edinburgh Advice Shop. The Secretary of State was represented by Mr Bartos, advocate, instructed by Mr Harvie, Solicitor, of the Office of the Solicitor to the Advocate General. I am grateful to them both for their helpful submissions.

The arguments

8. Mr Little conceded that, taking the decision as a whole, the tribunal used the correct statutory test by expressly referring to "severe discomfort" and made adequate findings on addressing that. However he maintained that Mr Commissioner Walker QC is right that the question of true pain is something more than severe discomfort and that this is what a tribunal ought to have in mind when applying the test to the facts of the claimant's case.

9. On behalf of the appellant Mr Little also accepted that in CSDLA/101/00, Mr Commissioner May QC had deprecated the reliance on a direction made in the decision of a Commissioner without reasons as authority for a proposition of law. However, he submitted that what Commissioner Walker QC said in CSDLA/678/99 is both correct and supported by other authority. Once severe discomfort is experienced by the claimant a tribunal must assess matters up to this point only. Mr Little acknowledged that only if he satisfied me that the tribunal erred in declining to follow the Commissioner's approach, could he succeed.

10. Mr Little relied particularly on two earlier reasoned decisions of Mr Commissioner Walker QC. At paragraph 9 of CSDLA/78/94 the Commissioner said:-

> "…..
> What the legislation requires the adjudicating authorities to determine is whether, before the onset of *severe discomfort*, the claimant is, in the normal sense of English, able to walk. Someone who starts to suffer discomfort after a few steps and severe discomfort after a few further steps, for example, might well be said to be 'virtually unable to walk'. On the other hand, someone able to walk the better part of 100 yards *without any severe discomfort* could hardly be said to be virtually unable to walk. I need hardly point out that *severe discomfort* is something much less than pain and may include breathlessness.
> ……"

11. Then in CSDLA/182/95 the same Commissioner said:-

> "9. The new tribunal will require to determine first, … whether they accept the claimant suffers some pain from his feet and ankles all the time. If so they will have to try to assess the degree thereof as to whether it amounts itself to "severe discomfort"…….
>
> 10. If, however, there is not now being suffered constant "severe discomfort", ….. the tribunal will have to try to assess at what point, from the evidence, in the course of seeking to walk, the claimant does begin to suffer "severe discomfort". It is the distance, primarily I suspect in this case, prior to the onset of severe discomfort that will govern the decision. Is that a distance which, in normal English, is so limited that the claimant falls to be described as "virtually unable to walk"? ……"

12. Mr Little further relies on the comment by Mr Commissioner Howell QC at paragraph 15 of CDLA/608/94:-

> "....the question that needs to be answered is how far the person can walk before severe discomfort is occasioned by going any further...."

13. The Secretary of State by written submission supported the appeal but that position was resiled from prior to the hearing. In response to Mr Little's oral arguments, so far as the relationship between "true pain" and "severe discomfort" is concerned, Mr Bartos relied on the reported case R(DLA) 4/98, at paragraph 14 of which Mr Commissioner Williams said:-

> "14 .....The fact that someone suffers pain as a result of walking, or walks "in pain", does not automatically mean that he or she is walking with severe discomfort or is unable to walk without severe discomfort. The pain may be mild, moderate or severe, shortlived (sic) or chronic. The tribunal must decide for itself whether there is severe discomfort considering all the evidence, and perhaps taking into account other factors causing discomfort in addition to the pain. Someone suffering severe pain is almost certainly suffering severe discomfort. But it does not follow that, become someone is not suffering severe pain, he or she is not suffering severe discomfort."

14. Mr Bartos asked me to find erroneous the approach of Mr Commissioner Walker QC as set out at my paragraph 2 above. He submits that the correct test is to look at how the claimant makes progress on foot out of doors, having regard to distance, speed, length of time and manner of walking but discounting any walking achieved only with severe discomfort.

15. This is the approach required by the statutory criteria and as interpreted by Mr Commissioner Edwards-Jones in R(M) 1/81, in particular in the following passage from paragraph 9:-

> "Shortly explained, the correct construction gives to the words "without severe discomfort" in context the sense of requiring that you are to look only at what are the limits (if any) of the claimant's ability to walk outdoors *without* severe discomfort, be the limitation(s) in point of distance, speed, length of time or manner, and ignore any extended outdoor walking accomplishment which the claimant could or might attain only *with* severe discomfort.
>
> So regarded the position will be – as commonsense suggests it should be – that the criterion is that of ability to walk outdoors without discomfort, and there will be equal eligibility for two claimants of equal and sufficient limited walking ability nothwithstanding that the limited ability which they have in common is in the one case unattended by any severe discomfort and that the limit is reached in the other by reason of supervening severe discomfort."

16. Mr Bartos argues that accepting that any walking only achieved at the expense of severe discomfort is to be ignored is not the same as saying that the test stops at the first onset of such discomfort.

My conclusion and reasons

Severe discomfort

16. "Severe discomfort" is the statutory phrase. But its application to the circumstances of a claimant's case is an issue of fact, provided the tribunal's judgement is rationally exercised having regard to the evidence and is thereafter adequately explained.

17. Thus, provided a tribunal's conclusions are expressed in terms of the relevant legislation and are not perverse, that is what counts and "true pain" does not automatically

mean "something more than severe discomfort". I endorse Commissioner Williams' conclusion in R(DLA) 4/98 that a tribunal must decide for itself whether there is severe discomfort having looked at all relevant factors causing the discomfort. The difficulties inherent in equating the concept of pain with severe discomfort is demonstrated by the fact that in CSDLA/78/94, Mr Commissioner Walker QC considered that "...severe discomfort is something much less than pain". Whereas a year later in CSDLA/182/95, he took the view that once the tribunal had accepted that the claimant suffered pain, then it had to assess the degree of pain and whether that amounted to "severe discomfort".

Virtual inability to walk and the relevance of severe discomfort

18. Perhaps the most litigated area in Social Security law is the test set out in regulation 12(1)(a)(ii) of the Social Security (Disability Living Allowance) Regulations 1991 (regulation 12(1)(a)(ii)). The test is expressed in relatively few words contrasted with what has been extensively argued and written on its meaning and application in fact and in law.

19. I deduce the following propositions from the case law with respect to regulation 12(1)(a)(ii):-

(a) R(M) 1/81 establishes that the adjudicator evaluates the restrictions (if any) on the claimant's ability to walk out of doors without severe discomfort, whether the limitations are in respect of distance, speed, length of time or manner.

(b) The relevant question is how far the claimant is limited in walking without suffering severe discomfort rather than before severe discomfort begins to set in. As Commissioner Howell QC put it in CDLA/608/94 at paragraph 15:-

> "An ability to walk 50 yards which can only be accomplished at the expense of the onset of pain amounting to severe discomfort for some time afterwards is not an ability to walk without severe discomfort, even if the pain does not begin in real earnest until the end of the 50 yards."

(c) It is an error of law to equate the onset of severe discomfort with the point at which the claimant stops walking. Walking which gives rise to severe discomfort is discounted. If a claimant walks 100 yards of which the last 10 are after the onset of severe discomfort, he must be judged as if the distance he walks at that stage is the farthest distance he can go without such a result, which could be 80 yards only. When he stops is evidentially relevant to determining what are a claimant's real limitations but, as Mr Commissioner Jacobs pointed out in CDLA/1389/97, at paragraph 50(d):-

> "...a claimant may cover only a particular distance because there is no need or reason to go any further. For example, a claimant may only walk 20 yards because that is the distance to the shop where the claimant buys a newspaper before returning home to read it."

(d) Rests which a claimant is forced to take from time to time before continuing to walk must be included when calculating "the length of time" the claimant takes to walk a particular distance. Otherwise, as Mr Commissioner Rowland points out in CDLA/805/94, there would be little purpose in regulation 12(1)(a)(ii) including the three separate factors of speed, distance as time as the first is a function of the last two.

(e) Mr Commissioner Rowland follows the same approach in CDLA/4388/99 and, more recently, in CDLA/2050/2002. In the latter cited case he makes the particular point that a tribunal must consider, where a claimant pauses, whether he can "walk further or whether that really was the absolute limit of the claimant's capacity to walk" (paragraph 17).

(f) In CDLA/6104/1999, Deputy Commissioner Newsome at paragraph 8 makes the valuable point:-

> "It may be the case that a claimant rests at a particular point because he is already in severe discomfort or because he will immediately be in such discomfort if he continues or because he is able to pace himself in such a way that if he rests at particular intervals even though the threat of severe discomfort is nowhere near imminent he will be able to progress some considerable distance before such a threat materialises. It is in connection with the latter alternatives that the pace or speed of walking becomes highly relevant in assessing whether the claimant can be taken to be virtually unable to walk."

20. None of the above cases nor those cited in argument directly answer the question before me. However, the statutory wording makes clear that the focus of whether a person is "virtually unable to walk" under regulation 12(1)(a)(ii) is on the limitations imposed by the claimant's physical condition as a whole on an ability to make progress on foot out of doors. This judgement of fact and degree is, as Commissioner Howell QC said in CDLA/608/94 (at paragraph 13) "intended to be a broad one".

21. All the aspects of a claimant's walking are to be considered which result from physical disablement and an evaluation of its quality is then made. This is on the basis that firstly, walking achieved only with severe discomfort is discounted and secondly, that a tribunal must pay appropriate regard to manner, speed, distance and time. This exercise is carried out with the purpose of determining whether, taken overall, the claimant's walking out of doors is properly described as "virtually unable to walk".

22. If a stop is the absolute limit of the claimant's capacity to walk then no issue of taking the test only to the first onset of severe discomfort arises. But if a claimant recovers after a period of rest and continues walking without severe discomfort, then the statutory test does not preclude such continued walking from being assessed. The tribunal must judge from the evidence such relevant factors as how far the claimant can initially walk without experiencing severe discomfort, how long any severe discomfort lasts before it subsides or, if he has paused to prevent such discomfort then the necessary duration of that pause, how frequently these halts recur if at all, and what is the total distance and time he can walk in this manner without severe discomfort.

23. Time, speed, manner and distance of walking, achieved without severe discomfort, are therefore balanced in order to reach an overall judgement on whether the claimant is virtually unable to walk. If a claimant has to rest an hour between each set of walking before severe discomfort subsides, he or she is more likely to be virtually unable to walk than a claimant who requires only 5 minutes. Conversely, if a claimant with morning stiffness through rheumatoid arthritis walks the first minute out of doors in severe discomfort, stops for 4 minutes in order to flex his limbs and thereafter is enabled to walk 10 miles without severe discomfort at a reasonable pace and speed and without further halts, the statutory

criteria do not prevent a conclusion which is in no way perverse, that such a claimant does not fall within regulation 12(1)(a)(ii).

24. All of these are matters for the good sense of tribunals. It is not, however, the law that only walking to a first halt required through severe discomfort is relevant. This adds an unjustifiable gloss to the statutory criteria given the broad purpose of the test under regulation 12(1)(a)(ii), which is to establish the practical limitations on a person's ability to walk due to the stated factors.

Summary

25. I agree with the Secretary of State's submission that the approach of the Commissioner set out in the ultimate paragraph of CSDLA/678/99 is incorrect and an unwarranted restriction on the statutory terms. My decision is therefore that set out at paragraph 1 above.

(Signed)
L T PARKER
Commissioner
Date: 25 February 2003