Bulletin 164

SOCIAL SECURITY AND CHILD SUPPORT COMMISSIONERS

Commissioner's File No.: CDLA/948/2000

Starred Decision No: 73/01

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5th Floor, Newspaper House, 8-16 Great New Street, London EC4A 3BN.

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Commissioners file: CDLA/948/2000

SOCIAL SECURITY ACTS 1992 TO 1998

APPEAL FROM A DISABILITY APPEAL TRIBUNAL ON A QUESTION OF LAW

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. This appeal is allowed. The decision of the tribunal is set aside and the case is remitted to a new tribunal to determine in accordance with the directions given below.

2. The appeal is brought with the leave of a commissioner from the decision of the Manchester Disability Appeal Tribunal given on 14 October 1999 that the claimant was not entitled to an award of either component of disability living allowance. In its summary of grounds, the tribunal stated that having considered all the evidence, particularly the medical evidence, the tribunal was satisfied that there was no evidence of severe physical or mental disablement for the purposes of disability living allowance.

3. The claimant was at the time 51 years old. She had been in receipt of the middle rate of the care component for day needs and the higher rate of the mobility component from 8 February 1996 to 7 February 1999, but on renewal the adjudication officer had declined to make an award. After reciting these facts in its statement of material facts and reasons, the tribunal continued as follows:

> "2. [The claimant] suffers from widespread non-specific pain. Her sufferings are entirely psychological and physiological [sic] and no diagnosis has been made. There is no objective evidence of the degree of disability claimed by [the claimant]. There is no joint heat or wasting. She has full function in all her limbs. She is safely mobile throughout her home. It is not accepted that she falls three times a week with no warning and has been doing so for the last five years. She has never required any medical treatment following an alleged fall or sustained any serious personal injuries or bruises. In a lady as overweight as [the claimant] it would be expected that she would suffer bruising or fractures with regular falls over a long period. She has not been referred to a Consultant for alleged regular blackouts."

4. The tribunal went on to make findings of fact as to the claimant's mobility and ability to look after herself which, if supported by adequate reasons, would

probably have justified the conclusion that the claimant was not entitled to an award of either component of disability living allowance. However, the tribunal gave no reasons for its conclusions in these respects, but continued as follows after stating that there was no claim for night needs:

"2. [The claimant] was examined by a Visiting Doctor on 6 November 1998 and the doctor found that she was fully orientated in time, place and person and there was no cognitive deficit. The heart and circulation systems were normal. The lungs were normal. The doctor stated that [the claimant] actively opposed movement in all four limbs. [The claimant] complained of numbness of the whole of the right leg but the doctor found that this was not consistent with the nervous system anatomy. The doctor found no joint heat, wasting or effusion. The doctor noted all muscles were tender and noted that [the claimant] actively opposed extension and flexion of the arms and legs. The vision and hearing tests were normal and there was no evidence of any neurological deficit. The Visiting doctor considered there was full function of all the limbs and he could find no objective evidence for the claimed disability. Although he put 'probably fibromyalgia' this is not a diagnosis and he then put 'widespread non-specific pain' and stated at Part 4 of the report that there are "no objective signs – disability seems psychological" and at Part 9 of the report he states that her sufferings seem entirely physiological" [sic]. The Tribunal accepts the report of the Visiting Doctor as it is the report of an impartial doctor based on his clinical findings, observations and information given to him by [the claimant].

"3. On 20.8.1998 Dr Reddy stated that [the claimant] suffered from backache and vertigo. On 16 February Dr Reddy stated that she suffered from arthritis. In May 1999 she was examined by Dr R C Hilton, Consultant Rheumatologist whose diagnosis was "unexplained widespread pain" and he stated that she "exhibits significant abnormal illness behaviour" and he could find no evidence of any inflammation in her peripheral joints. On examination by Dr Hilton she complained of pain with movement of most of her peripheral joints, particularly the shoulders and hips, where movement was actively resisted. With encouragement Dr Hilton found all the other peripheral joints had a full range of movement. Dr Hilton stated she complained bitterly of pain in her knees but there was no synovitis. He stated that "she felt pain with gentle skin pinching". The Tribunal is satisfied that the report of Dr Hilton complements the report of the Visiting Doctor and the Tribunal prefers the evidence from these impartial doctors to that of Dr Reddy.

"4. Having accepted the reports of Dr Hilton and the Visiting Doctor the Tribunal is not satisfied that [the claimant] is suffering from a physical disablement for the purposes of Section 73(1)(a) of the Social Security Contributions and Benefits Act 1992. Neither is the Tribunal satisfied that she is severely disabled physically or mentally for the purposes of Section 73(1)(d). The Tribunal is therefore satisfied that she does not satisfy the criteria for an award of either rate of the mobility component.

"5. The Tribunal is also not satisfied that she is severely disabled physically or mentally for the purposes of Section 72(1) of the Act. The Tribunal notes

that Dr Reddy on 11 June 1999 refers to blackouts but qualifies this by stating that the information was given to him by her husband. In view of the findings in the reports of the Visiting Doctor and Dr Hilton the Tribunal is unable to accept [the claimant's] evidence and is satisfied that she does not fulfil the criteria for an award of either the lowest or middle rate of the care component."

5. The commissioner who gave leave to appeal did so in order that it could be considered whether the tribunal applied the correct test and submissions have been addressed to this question. Before I consider this question, however, I would observe that the statement in paragraph 2 of the statement of material facts that the claimant's sufferings were entirely psychological and physiological is a strange one. It appears to be based on the tribunal's reading of Part 9 of the visiting doctor's report that the claimant's sufferings seem entirely physiological (see paragraph 2 of the tribunal's reasons). In fact, as the claimant's representative has pointed out, in Part 9 of his report the doctor does not say "physiological" but "physchological", which in the context is clearly a slip of the pen for "psychological". The full sentence reads "I find no objective evidence of disability claimed her suffering seems genuine but entirely physchological". To describe her suffering as genuine but physiological would make no sense. To describe it as genuine but psychological is comprehensible (whether right or not), and ties in with a similar statement in Part 4 of his report to which the tribunal refers.

6. One is therefore left with the opinion of the visiting doctor, which seems to have been accepted by the tribunal, that the claimant "displays considerable disability but no objective signs – disability seems psychological" (Part 4 of the report) and that her suffering seems genuine but entirely psychological (Part 9 of the report). The tribunal seems to have been satisfied that Dr Hilton came to a similar conclusion. I accept that, as the claimant's representative has pointed out, Dr Hilton stated that he had arranged for a few further investigations to be carried out, but no evidence seems to have been adduced as to what these were or as to their results if they had occurred.

The tests under sections 72 and 73 of the Social Security Contributions and Benefits Act 1992

7. Section 72 of the Social Security Contributions and Benefits Act 1992 entitles a claimant to the care component of disability living allowance, subject to certain qualifications, if she is "so severely disabled physically or mentally that" certain consequences follow. Section 73(1) of that Act entitles her to the mobility component, again subject to qualifications, if she "is suffering from physical disablement such that [she] is either unable to walk or virtually unable to do so" – the higher rate – or if she "is so severely disabled physically or mentally that" certain limitations are imposed on her mobility – the lower rate.

8. The tribunal has found that the problems suffered by the claimant as described by the visiting doctor and by Dr. Hilton are not enough to amount to "suffering from physical or mental disablement". No reason is given for this apart from the

obvious one that psychological problems of this type and the resulting pain do not amount to physical or mental disablement.

9. The claimant has been found to suffer physical pain not because of any apparent physical problem but because of some unspecified psychological cause. This gives rise to two issues – whether the pain itself is physical disablement and whether the psychological cause is mental disablement. If either question is answered in the affirmative then the tribunal should have gone on to consider whether the pain or the psychological cause was so severe that the care component or lower rate mobility conditions were satisfied. If the pain was held to be physical disablement, but not otherwise, then (subject to a point to which I shall return as to the effect of the wording of regulation 12 of the Social Security (Disability Living Allowance) Regulations 1991 as amended) the tribunal should have gone on to consider whether the higher rate mobility conditions were satisfied.

10. In R(A)1/88, a medical board had found that a claimant's inability to walk was not due to a physical cause but was hysterical in origin. I observe that in this case it was necessary to show that the claimant suffered from physical disablement. An inability to walk due to mental disablement would not have qualified him for the award he sought. The claimant appealed contending that the medical appeal tribunal ought not to have reached such a conclusion without expert psychiatric evidence, and that in any event, even if the condition was hysterical, it was a manifestation of his physical condition as a whole. The commissioner rejected the claimant's appeal on the grounds that the medical board were experts and entitled to rely on their own expertise. He further held that although, in the last analysis all mental disablement might be ascribed to physical causes, it was obvious that the Act, in drawing a distinction between mental and physical causes did not mean this last analysis to be resorted to. It was for the medical appeal tribunal to decide as a question of fact whether the claimant's hysteria was a manifestation of his physical condition as a whole.

11. The decision was upheld in the Court of Appeal (reported as an appendix to R(M)1/88). Lord Justice O'Connor, in delivering the leading judgment, stated that the inability to walk was not itself the physical disablement. There must have been some physical disablement such that he was unable to walk. He further pointed out that subsequently to the decision of the commissioner the claimant had been awarded mobility allowance for life on a subsequent application on producing evidence that the hysteria had a physical cause. As was pointed out in CDLA/16484/1996, in a passage quoted at length later in this decision, it does not appear from the report that there was any physical factor which arose as a result of the hysteria which itself led to the limitations on the claimant's mobility. R(M)1/88, therefore, is authority only in a case where there is no physical cause for the mental state and no resulting physical factor which limits the claimant's mobility.

12. In R(A)2/92, the claimant, who was 21 years old, was given to violent and irresponsible behaviour and committed criminal acts of violence and dishonesty. An attendance allowance was claimed in respect of him, and it was necessarily to decide whether he was so severely disabled physically or mentally that certain

consequences followed. The attendance allowance board found that he was not suffering from a severe physical or mental disability and that his anti-social behaviour arose from a personality disorder. On the claimant's appeal, the secretary of state's representative contended that the phrase "severely disabled physically or mentally" relates to a condition of body or mind that can be defined medically and that it is not meant to encompass anti-social behaviour that is not related to serious mental illness. Mr. Commissioner Skinner found that the secretary of state's representative had correctly analysed the primary question which the board had to determine. He added at paragraph 10

> "Clearly where a person indulges in aggressive or seriously irresponsible conduct the Board has to consider whether that arises from some recognised disordered mental condition or whether it merely arises from a defective character."

13. This case does not decide that the tribunal or board must be able to identify the precise condition from which the claimant is suffering. It is possible, for example, that there is a difference of medical opinion as to that, although all doctors involved agree that there is mental disability and not simply a defective character or other problem. So too, a claimant may have a physical problem the cause of which is still being investigated. There is nothing in this decision which prevents a tribunal from concluding that there is a physical or mental disability if it concludes that that is the case on the balance of probabilities, but is unable to say on the balance of probabilities what the precise physical or mental cause is. Further, provided that the tribunal is satisfied on the balance of probabilities that the claimant is suffering from either a physical or a mental disability rather than some other problem, I can see no reason, except in relation to the higher rate of the mobility component with which I deal separately, why it needs to come to a conclusion as to which of various possible disabilities the claimant is suffering from.

14. Nor is the case now authority, if it ever was, for the proposition that before one gets on to the stage of considering the consequences of the disability the disability must be serious. It is now clear that the seriousness of the disability must be measured by reference to the consequences in terms of supervision or care needs or reduced mobility (see paragraph 6 of the common appendix to the decisions CDLA/15467/1996, CDLA/16176/1996, CDLA/1659/1997 and CDLA/2252/1997, and the cases referred to in that paragraph).

15. In CDLA/16484/1996, Mr. Commissioner Jacobs, sitting at that time as a deputy commissioner, was dealing with a case of chronic fatigue syndrome. The question arose whether the claimant was entitled to the higher rate of the mobility component. This turned on whether her problems were to be classified as mental or physical disablement. The tribunal had rejected this claim. It had found that the claimant suffered from myalgic encephalomyelitis and hypertension and that there was no evidence of any physical cause of the claimant's disablement. Mr. Commissioner Jacobs, after referring to R(M)1/88 as the leading case, stated that

> "12. So far as the facts as recounted by the Commissioner show, the claimant's inability to walk was a direct consequence of the hysteria. At least

that seems to be the basis upon which the tribunal made its decision. It does not appear that there was any physical factor which arose as a result of the hysteria which itself led to the limitations on the claimant's mobility. Hysteria might, for example, lead to lack of use of a claimant's legs, which might lead to atrophy of the muscles, which in turn would restrict the claimant's mobility. In such a case, the claimant would have a physical disablement and condition which affected mobility, albeit that the ultimate origin of the physical disablement was the hysteria. It is also possible that the hysteria might be caused by the pain resulting from a physical injury such that the restricted mobility arose from the claimant's physical condition as a whole.

"13. Applying the above reasoning to the present case, the proper classification of the claimant's chronic fatigue syndrome is not of itself decisive. What matters is the nature of the disablement which results from it."

16. The Commissioner went on to give examples of consequences of chronic fatigue syndrome which might cause an inability to walk, ranging from lethargy and lack of interest to loss of muscle and muscle power, and continued in paragraph 14

"These distinctions are easier to state than to draw in practice on the limited evidence of causation that is likely to be before the tribunal. Drawing the distinctions required involves careful inquiry and accurate fact finding. Drawing conclusions from the label which a particular doctor has given to the claimant's symptoms will be of no help. Likewise, the nature of the ultimate origin of the syndrome will be of little help. However difficult the task for the tribunal, the solution always begins with a simple question: what is it that stops the claimant walking?"

17. This decision was followed and approved by the Chief Commissioner for Northern Ireland in C8/00-01(DLA), in a case in which the tribunal had found that the claimant had a paralysis affecting his right side, even though the condition had been labelled as "hysterical". The tribunal had stated that the appeal in respect of higher rate mobility was not allowed because the claimant's condition was predominantly caused by his mental state and did not therefore amount to a physical disablement. This approach was held to be wrong by the Chief Commissioner, who plainly considered that the paralysis could properly be regarded as a physical problem.

18. On the other hand, in CDLA/5183/97, the claimant was found to be suffering from chronic fatigue syndrome and back pain. An issue arose whether the claimant's walking difficulties arose from physical disablement. Deputy Commissioner Warren held that it was not for a commissioner to rule on whether or not chronic fatigue syndrome had a physical cause, nor was there any general policy that disability appeal tribunals could have on the matter. A tribunal, in each individual case had to examine the evidence before it and reach a conclusion on whether the walking difficulties which an individual claimant experiences arise from "physical disablement" for the purposes of the statute, and the claimant's "physical condition as a whole", the matter to be considered under regulation 12(1)(a)(ii) of the Social Security (Disability Living Allowance) Regulations 1991 in considering virtual inability to walk.

19. The Deputy Commissioner concluded that the tribunal was entitled to conclude that the claimant's back pain in that case did not arise from physical disablement. It is implicit in that decision that physical pain which is not due to a physical cause cannot be relied on in assessing whether a person is virtually unable to walk. That was also the decision in CDLA/15106/96, where it was argued that there was physical disablement where a tribunal found a claimant to be suffering from genuine pain due to a psychological condition. Mr. Commissioner Rowland held that

> "it is important to note that 'physical disablement' is a phrase that appears only in s.73(1)(a) of the Act. Regulation 12(1) of the Regulations provides that a person shall be taken to satisfy the conditions mentioned in s.73(1)(a) *only* in the circumstances prescribed in that paragraph and the phrase that appears in that paragraph is 'physical condition as a whole'. Pain is a physical symptom and it may be said that in one sense disablement due to pain is 'physical disablement'. However, it may be a symptom of either a physical condition or a psychological condition. In this case the tribunal found it to be a symptom of a psychological condition and therefore the claimant's circumstances did not fall within the terms of reg.12(1)(a) of the Regulations. They were entitled to make that finding."

20. However, in CSDLA/265/97 Mr. Commissioner Walker QC held that if the claimant's muscle pains and other physical problems were not mental, illusory or imaginary, they could be regarded as physical disabilities without investigating whether they are in turn caused by a physical condition. Those observations, in a case of chronic fatigue syndrome, were concerned with the question of entitlement to the higher rate of the mobility component on the ground of the claimant's virtual inability to walk, which is determined by regulation 12. They do not expressly address the effect of the expression "physical condition as a whole" used in regulation 12 and considered in CDLA/15106/96; and if that decision was correct, then CSDLA/265/97 must be wrong.

21. I must therefore consider which of these decisions to follow in relation to the question of a person's virtual inability to walk. In relation to other aspects of disability living allowance there is no conflict in that Mr. Commissioner Rowland in CDLA/15106/96 accepts that in one sense disablement due to pain is physical disablement and reaches his decision only by reference to the wording of regulation 12.

22. Regulation 12, as amended following the enactment of the Social Security Contributions and Benefits Act 1992, is made pursuant to section 73(5) of that Act which provides for circumstances to be prescribed in which a person is to be taken to satisfy or not to satisfy a condition mentioned in s.73(1)(a) or (d). The regulation is therefore specifying circumstances in which a person is suffering from physical disablement such that he is unable or virtually unable to walk, and the words "physical condition as a whole" must be read in this context. If a person is in such pain that she cannot bear to be touched and cannot put one foot in front of another without agony, I find the greatest difficulty in seeing how this can be said not to be part of her physical condition because there is no physical

cause for the pain. I consider that a physical symptom, if genuine, is part of a person's physical condition as a whole even if caused by psychological factors, whether it is pain, paralysis or something more mundane such as a skin rash. I do not see how it can be separated from it as the commissioner in CDLA/15106/96 sought to do. This must be all the more so in the context of a regulation defining when a claimant is physically disabled. It therefore appears to me that the decision of Mr. Commissioner Walker Q.C. was correct, and that, as a matter of law, construing section 73 and regulation 12, genuine physical pain is part of a person's physical condition even if caused by, or a symptom of, psychological factors.

23. Applying my conclusions to the present case, it appears to me that, on the basis of the tribunal's findings of fact, the physical pain suffered by the claimant is as a matter of law part of her physical condition regardless of its origin. The tribunal ought therefore to have gone on to consider whether as a result of the pain she was so severely disabled as to have mobility problems or care needs which qualified her for an award of either or both components of disability living allowance. The fact that the origins of the pain are psychological rather than physical is irrelevant for this purpose and the tribunal erred in law in failing to deal with the case on this basis.

24. The representative of the secretary of state has contended that the establishment of a disability caused by a medically recognised, physical or mental condition is an essential prerequisite for the award of either component of disability living allowance. It appears to me to follow from the decisions cited above that, except to the extent that there must be physical disablement for the purposes of higher rate mobility, the cause of the disability is not decisive. This also follows from the decision of Mr. Commissioner Levenson in the common appendix to CDLA/15467/1996, CDLA/16176/1996, CDLA/1659/1997 and CDLA/2252/1997, Mr. Commissioner Levenson held that the words "physically" and "mentally" were ordinary words of the English language to be understood in the ordinary way by members of the tribunal, although to be applied in the way required by law, and that the focus of section 72 of the Social Security Contributions and Benefits Act 1992 was on the needs of claimants and on their ability to cope without assistance, rather than on any specific diagnosis. At paragraph 8 of the appendix, the commissioner stated

> "In order to decide whether a claimant is "disabled physically or mentally" the tribunal must take into account all relevant medical and other evidence... A medical report describing or confirming a well established or well known diagnosis ... or a "clinically well-recognised illness" ... might settle this particular issue. However, that does not mean that the absence of such a report, diagnosis or illness must inevitably lead to the conclusion that the words of the statute do not apply. The state of medical knowledge is neither certain nor static. The tribunal should consider the manifestations of a condition and the actions and abilities of the claimant together with any other evidence. The fact that no diagnosis has or has yet been made, or that no label has been given or has yet been invented for the condition, does not deprive the tribunal of its jurisdiction and responsibility to decide the issue. It is for the

tribunal, and not for an external expert, to decide whether the claimant "is disabled physically or mentally".

25. I agree with that statement of law, and it should be adopted by the new tribunal determining this case.

26. At paragraph 10 of the appendix, the commissioner went on to refer to an earlier decision of his, CDLA/15892/1996 where a tribunal had found that the claimant suffered from persistent nocturnal enuresis requiring attendance but that he was not suffering from any severe physical or mental disability giving rise to his need for care. In that case the commissioner did not find it necessary to go beyond the plain words of the section but he said at paragraph 6 that "It seems to me that to suffer from enuresis is to suffer from a disability. Whether it is physical or mental in origin, or whether its origin can or cannot be established, is irrelevant." In making that observation the commissioner was considering only care needs and not higher rate mobility where the distinction between physical and mental disability is material.

27. In CSDLA/512/98, Mr. Commissioner May QC dissented from the approach of Mr. Commissioner Levenson. He held that approach to be contrary to the view reached by Mr. Commissioner Skinner in R(A)2/92, which, he pointed out, as a reported decision had the assent of the majority of commissioners. He continued:

> "I am satisfied that the establishment of a disability caused by a medically recognised, physical or mental condition is an essential prerequisite. To hold otherwise would broaden the scope for disability living allowance far beyond what is envisaged by the statute."

28. I cannot agree that there is any conflict between the decisions of Mr. Commissioner Levenson and R(A)2/92. In R(A)2/92 the issue was whether the claimant suffered from a mental disability at all, not whether it was necessary to resolve a dispute as to which of two mental disabilities he suffered from. The use of the word "recognised" in R(A)2/92 must be read in this context. Mr. Commissioner Skinner was not considering a situation in which there was plainly a disability and the only question was which one, and in my judgment can have meant no more than that the condition in question must be medically recognised as a disability.

29. Nor can I agree with Mr. Commissioner May's suggestion that this approach would broaden the scope for disability allowance far beyond what is envisaged by the statute. The statute does not say that the disability must be identified, and I cannot see that a dispute between doctors, or the absence of a precise diagnosis of the disability can possibly have been intended by parliament to take out of benefit the unfortunate sufferer who would qualify whichever of the possible diagnoses eventually proved to be right. Indeed, this approach is inconsistent with the approach of other commissioners in the decisions referred to above.

Psychological causes

30. In the present case, the visiting doctor found that the claimant genuinely suffered from pain due to psychological causes. The term "psychological" and the term "mental disablement" are not synonymous, as was pointed out recently by Mrs. Commissioner Brown in C42/99-00(DLA). The new tribunal will have to make its own findings of fact. If it concludes that the claimant's pain is indeed real physical pain, then it may not need to be concerned to determine whether there is any mental disablement as well. If, however, it concludes that the pain is not real and physical, then, except in relation to higher rate mobility, it may have to consider whether the claimant has a mental disability. In that case, it should bear in mind that it should give reasons for its conclusions, and that it will not be enough for it simply to describe the problems as psychological whether it finds that there was or was not mental disablement.

Conclusion

31. I do not consider it appropriate to substitute my own decision, although I have little doubt as to the decision to which the tribunal would have come on its findings of fact as to the effect of the pain on the claimant's abilities had it directed itself properly. The tribunal gave no explanation as to its findings of fact in relation to these matters, and I consider that this issue is one for a new tribunal to determine on the evidence before it.

32. I direct that the new tribunal shall treat any psychosomatic pain of the type claimed by the claimant as a physical disability and as part of the claimant's physical condition, provided that it is satisfied that it is genuine physical pain, whatever its cause. Whether it is so severe as to result in her being entitled to any award of either component of disability living allowance is a question for the tribunal to determine in the normal way. Insofar as the tribunal needs to make any findings as to mental disablement, it should follow the directions given in paragraph 30 above.

33. The appeal is allowed and the case is remitted to a new tribunal accordingly.

(signed) Michael Mark
Deputy Commissioner

1 June 2001