

Alma Lee Mason

*Miriam G. 'Sorel'
December 1995
with her own*

**12/98
CRAG*

DW/f

Commissioner's File: CDLA/12940/1996

**SOCIAL SECURITY CONTRIBUTIONS AND BENEFITS ACT 1992
SOCIAL SECURITY ADMINISTRATION ACT 1992**

**APPEAL FROM A DECISION OF THE DISABILITY APPEAL TRIBUNAL
ON A QUESTION OF LAW**

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1 I allow the claimant's appeal, brought by leave of the Commissioner, from the decision of the Mansfield disability appeal tribunal on 12 October 1995 that the claimant is not entitled to disability living allowance. This is because the decision is erroneous in point of law. I therefore set it aside. However, I substitute for that decision my own decision to similar effect, which is that the claimant is not entitled to disability living allowance in respect of her claim treated as made on 8 November 1994.

2 The claimant suffers, on the findings of the tribunal, from osteoarthritis, supraventricular tachycardia and anxiety. In her claim, she mentioned some mobility and care needs but the adjudication officers that considered and reviewed her claim did not award any disability living allowance. The claimant appealed to the tribunal, adding that she had been awarded severe disablement allowance in or before April 1995. She also submitted some supporting medical evidence.

3 The claimant's representative sought leave to appeal because the tribunal had applied the wrong test in determining the claimant's ability to walk. The claimant added to this her own comments about the tribunal's decision and her medical problems. I can consider these comments only if I consider that the tribunal's decision is erroneous in law. I am therefore unable to consider any new evidence, explanations of the facts before the tribunal, or issues about the significance of the claimant's problems except in this context. I note, however, that the claimant's comments do not call into question the tribunal's decision about the care component, and I see no error of law in the tribunal's decision on this question. Nor do I see any errors of law in the tribunal's determination on the question of the lower rate of the mobility component. It is also clear from the record that the tribunal noted the medical evidence and heeded the advice of the member of the tribunal with medical experience, particularly that the claimant's problems were "disturbing for the peace of mind of a person suffering from it."

4 In this appeal, I am therefore concerned with one issue. Did the tribunal properly consider whether the claimant was or was not entitled to the higher rate of the mobility component?

5 The tribunal's finding on this question was:

"At the date of claim she was able to walk 1000 yards in 25-30 minutes at a steady pace and with normal gait. If she walked greater distances she got breathless. Since she submitted her claim she has suffered from osteoarthritis and was referred to a consultant rheumatologist. Her ability to walk has reduced as a result of the arthritis but she is still able to walk at least 150 yards slowly, with a normal gait and little pain. She claims that she is not prepared to go out of doors alone."

This is consistent with the statements recorded in evidence by the tribunal.

6 The tribunal's reasons noted the deterioration, and added

"Nonetheless it was clear on her evidence that she was able to walk 125 metres with one stop and without the use of a walking stick. We are satisfied that she will walk slowly for the distance but with normal gait and with some discomfort but not severe pain. In our view this does not come within the definition of "virtually unable to walk"."

7 The adjudication officer now acting submits that there is no error of law in the decision. The claimant's representative in response submitted that the tribunal had applied an incorrect interpretation of severe discomfort and pain, and had not adequately explained its reasoning. The issue that the representative raises is the relationship between "severe discomfort" and "pain". The test of virtual inability to walk is laid down in regulation 12 of the Social Security (Disability Living Allowance) Regulations 1991, and the condition is satisfied by a claimant only if:

"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."

However, the claimant's representative and the adjudication officer now acting disagree about the application of this test to the current case. One submits on the basis of authority that "pain" is a lesser test than "severe discomfort", while the other, also on the basis of authority, submits the reverse. I dealt with this problem in my recent decision on file no CDLA/1101/1997. I have adopted and adapted the reasoning from that decision in the following paragraphs.

8 There is some guidance on the relationship between pain and severe discomfort in the caselaw on disability living allowance and its predecessor the mobility allowance. The history of what is now regulation 12 is discussed in Decision R(M) 1/81. I do not need to repeat it. In that decision, the Commissioner also adopted the meaning given to "severe discomfort" in Decision CM 1/81. The Commissioner, commenting on the then new test of

severe discomfort, stated in CM 1/81: "I think that that phrase must receive a wide interpretation, and must be held to include pain, fatigue and unease of all kinds" (paragraph 5).

9 The meaning of "severe discomfort" was also considered by a Tribunal of Commissioners in R(M) 1/83. The Tribunal rejected an argument that severe discomfort included a risk of severe discomfort. It held that "In our view ... the words "severe discomfort" related to matters like pain and breathlessness that may be brought on by walking." The meaning given by the Commissioner in CM 1/81 was also endorsed.

10 In Decision R(M) 1/91, the Commissioner was asked to decide if the description of a person walking "without apparent pain or distress" was sufficient to say that the person was walking without severe discomfort. In the Commissioner's view: "If anything, "pain or distress" constitutes a lower threshold than "severe discomfort." The Commissioner also stated that " it cannot be over-emphasised that whether a claimant experiences pain and whether such pain amounts to "severe discomfort" ... are matters of medical opinion for the sole determination of the tribunal". At the time of that decision it was for a medical appeal tribunal not a disability appeal tribunal to decide such issues on appeal, so that it could be determined using the medical expertise of the tribunal. This is no longer so.

11 In *Cassinelli v Secretary of State for Social Services* (29 November 1991), the Court of Appeal was asked to consider a decision of a medical appeal tribunal refusing mobility allowance. The tribunal had reached a decision refusing benefit to the claimant because it found that there was no evidence that the exertion of walking caused the claimant "severe pain or distress". The Court allowed the appeal against the decision on the ground that it was erroneous in law. Giving judgment, Glidewell LJ said that:

" the phrase `severe pain or distress' seems to me to be drawing a distinction between the factor of pain, of which discomfort is a lesser concomitant, and the factor of distress which may arise from other reasons than pain: distress may result of course from pain or discomfort, but may also result from breathlessness...".

Before the Court, as his Lordship noted, the parties had accepted that "severe pain" is a condition more serious than "severe discomfort". The Court held that the tribunal had applied the wrong test in concentrating on severe pain or distress and not severe discomfort.

12 "Pain" is a word encompassing a wide range of intensities. It is " a localised or diffuse abnormal sensation from discomfort to agony, caused by stimulation of functionally specific peripheral nerve endings" (Blakiston's Gould Medical Dictionary), or "a more or less localised sensation of discomfort, distress, or agony, resulting from the stimulation of specialised nerve endings" (Dorland's Medical Dictionary). "Discomfort" is not a term defined in medical dictionaries. It has been defined as "the condition of being uncomfortable; uneasiness" (Oxford English Dictionary). This may be the

definition that the Commissioner had in mind in CM 1/81. In that sense, I respectfully adopt from the judgment of Glidewell LJ the guidance that "discomfort" describes the sensation experienced from lesser levels of pain. The medical definitions both also stress that the sensation of pain arises from a particular functional or physical source. As noted in R(M) 1/83, the sensation of discomfort might also arise from other causes. For example, in this case the sensation of discomfort experienced by the claimant when walking is due to pain in her knees, but may be made worse by the claimant becoming breathless. This is so although breathlessness may not itself directly cause pain.

13 How does "severe" qualify "discomfort"? A person who suffers severe discomfort is treated as being virtually unable to walk, and the severity of the discomfort is to be measured with this in mind. "Severe" is an evaluative term, which may be contrasted with moderate or mild, but is not open to precise definition. In the context of a person "in pain", "severe pain" suggests, as noted above, a higher level of intensity of sensation than "severe discomfort". "Mild pain" might not by itself cause a sufficient level of sensation to be "severe discomfort". As the Commissioner said in Decision CDLA/8298/1995, "The meaning of "pain" is not identical with that of "severe discomfort". It may be relevant to determine how extensive the pain is, as well as how intensive. For example it may be relevant whether the pain is acute but short-lived only, or chronic and continuing for some time after the effort of walking. It follows that a finding that a person is "in pain", or "suffers pain" is not sufficient to determine whether that person suffers severe discomfort. It is necessary to consider the severity of the sensation. Other factors causing uneasiness may also need to be taken into account to evaluate the person's total level of discomfort.

14 In my view, the position is therefore as follows. 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, short-lived 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, because someone is not suffering severe pain, he or she is not suffering severe discomfort.

15 In the present case, the tribunal was therefore applying the wrong test in stating in its reasons that the claimant did not come within the provisions because she could walk 125 metres with some discomfort but not severe pain. Its decision is therefore erroneous in point of law and must be set aside.

16 The adjudication officer now acting submitted that if, in my view, the decision of the tribunal was erroneous, I should substitute my own decision to similar effect. I may do this under section 23 of the Social Security

Administration Act 1992. In this case, the tribunal reached the clear findings of fact that are set out in paragraph 6 above. These indicate a walking ability of at least 125 metres (about 135 yards) with normal gait and little pain. In the reasons, the tribunal further describe this as walking without the use of a stick, one stop and some discomfort.

17 The claimant added further comments in support of her appeal, although her representative did not relate these to the grounds of appeal. Her comments emphasised in particular the claimant's worry about her condition. She also commented about her ability to walk. No further medical evidence or other new issue was raised, and in my view her comments do not add any new element to the evidence considered by the tribunal. I am satisfied, on all the evidence, and in particular on those findings that, in the words of regulation 12 of the Social Security (Disability Living Allowance) Regulations 1991, the claimant's physical condition as a whole is *not* 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, that she is virtually unable to walk.

18 I therefore consider for these reasons that the tribunal should have decided that the claimant is not entitled to the higher rate of the mobility component in respect of her claim. Accordingly, I give that decision in paragraph 1.

David Williams
Commissioner

16 February 1998