Higher Rate Mobility – Virtual Inability To Walk – Tests Severe Disorder, Not Pain

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

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

Claimant's name:	[redacted]
Tribunal venue:	*Exeter*
Tribunal number:	[redacted]/96/[redacted]

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. My decision is as follows:

1.1 The decision of the Exeter Disability Appeal Tribunal held on 10th April 1996 is erroneous in point of law: see paragraph 8 below.

1.2 Accordingly I set it aside and, as it is not expedient for me to give a decision on the claimant's appeal from the adjudication officer's decision, I refer the case to a differently constituted Disability Appeal Tribunal for determination.

1.3 I direct the Disability Appeal Tribunal which rehears this case to conduct a complete rehearing in order to decide whether at any time from the date of claim down to the date of hearing the claimant satisfied the conditions of entitlement to any rate of either component of Disability Living Allowance, and in particular to decide whether the claimant was entitled to the higher rate of the mobility component, having regard to the guidance in paragraph 11.

2. This is an appeal to a Commissioner against the decision of the tribunal brought by the claimant with the leave of a Commissioner. The adjudication officer supports the appeal.

3. The claimant's claim for Disability Living Allowance was treated as made on 24th April 1995. The claim was refused by adjudication officers at both first and second tier adjudication. The refusal was confirmed on appeal by the tribunal.

4. The written submission presented to the tribunal on behalf of the claimant stated that only the higher rate of the mobility component was in issue.

5. Section 73(1)(a) and (11)(a) of the Social Security Contributions and Benefits Act 1992 provides for entitlement to the higher rate where the claimant is virtually unable to walk. The meaning of virtual inability to walk is provided by regulation 12(1) of the Social Security (Disability Living Allowance) Regulations 1991. In particular, regulation 12(1)(a)(ii) provides that a person is virtually unable to walk if

"(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 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".

6. The tribunal made findings on the distance which the claimant could walk on good and bad days and found that he was in constant pain when walking. The tribunal made no findings on time, speed and manner of walking. However, the tribunal's findings concentrated on the key matters that were in dispute and the tribunal appears to have accepted the GP's description of the claimant's manner of walking, something which could hardly be disputed given the fact that one of his legs is shorter than the other. Despite the criticism of the tribunal's findings in the adjudication officer's submission to the Commissioner, I consider that they were adequate in the context of this case.

7. The tribunal's reasons for decision were:

"We have not found this case easy. The appellant can walk a distance of between 100 and 300 yards, depending on whether he has a 'good' or 'bad' day, although he describes a degree of pain we were unable to say that he experienced 'severe discomfort' when walking. He does not appear to us to meet the strick [sic] test of R(M)1/91."

8. The tribunal's reasons are inadequate, because it is not clear what the tribunal meant by the strict test of the decision of the Commissioner in R(M) 1/91. The decision deals with a number of matters relating to virtual inability to walk, but I am unable to say what the strict test was that the tribunal derived from it. The tribunal's decision is, therefore, erroneous in law.

Pain and discomfort

9. It may be that the tribunal had in mind the comments of the Commissioner on the relationship between pain and severe discomfort. This would be understandable in a case which appears to have turned on the stage at which the claimant began to experience severe discomfort.

10. There are comments in the authorities on the comparative severity of pain and severe discomfort. In R(M) 1/91, paragraph 4, the Commissioner said:

"If anything, 'pain or distress' constitutes a lower threshold than 'severe discomfort'."

Lord Justice Glidewell in giving the judgment of the Court of Appeal in Cassinelli v. Secretary of State for Social Services on 29th November 1991 said:

"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".

Not surprisingly, the latter passage is frequently cited by representatives on behalf of claimants who assert that they experience pain while walking.

11. Both the Commissioner and the Court of Appeal were concerned with the use of word "pain" in a tribunal's decision. A tribunal will be concerned with the use of word in evidence. An analysis of the nature of, and relationship between, pain and (severe) discomfort is unnecessary and unhelpful when analysing evidence. These are not words with precise meanings and as a result they are not used uniformly either by tribunals or by claimants and their representatives. It is important for the tribunal to avoid linguistic analysis, and to distinguish between the legal test to be applied and the evidence given. The legal test is of the claimant's walking ability "without severe discomfort": see regulation 12(1)(a)(ii) of the Social Security (Disability Living Allowance) Regulations 1991. The tribunal should obtain evidence of the symptoms which the claimant experiences whilst walking. That evidence may or may not use words like "discomfort", "pain", "distress", or "agony". Regardless of the language used to describe the symptoms, the tribunal must then relate that evidence to the legal test. In doing so the tribunal will take into account (a) the whole of the evidence, including such matters as the diagnosis, medication, and any medical evidence of disablement; (b) their assessment of the claimant's credibility as a witness; and (c) their assessment of the claimant's pain threshold and ability to report symptoms accurately. Finally a decision must be made whether the symptoms experienced by the claimant are properly described as "severe discomfort". The tribunal's reasons should explain how they have related the evidence to the terms of the legal test. The tribunal which rehears this case should approach the question of whether the claimant experiences severe discomfort in this way.

Conclusion

12. The tribunal's decision is erroneous in law and must be set aside. I cannot give the decision which the tribunal should have given on its findings of fact and it is not expedient for me to make further findings of facts. There must, therefore, be a complete rehearing of this case before a differently constituted tribunal in order to determine whether at any date before the rehearing, the claimant was entitled to any rate of either component of Disability Living Allowance. The tribunal will decide afresh all issues of fact and law on the basis of the evidence available at the rehearing in accordance with my directions in paragraph 1.3 above. As my jurisdiction is limited to issues of law, my decision is no indication of the likely outcome of the rehearing, except in so far as I have directed the tribunal on the law to apply.

Signed: **Edward Jacobs**
Deputy Commissioner

Date: **10th February 1998**

CDLA/15603/96

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19 May 1998

Dear Sir or Madam

re:- Round up of Commissioners' Decisions

I have recently been handling a case before the Social Security Commissioner, the decision of which is enclosed. The claimant's name has obviously been blanked out but you may feel it is worth a small report in the Welfare Rights Bulletin.

Whilst this is hardly a precedent setting case, I found it interesting to note the commissioner's comments on the way Disability Appeal Tribunal's should approach the question of pain and severe discomfort when walking (page 3) and the test that should be applied. This may be of use to representatives in future tribunals where this is an issue.

I also noted the tribunal's use of "the strict test of *R(M)1/91*". The Commissioner (as well as ourselves) were left entirely clueless as to the meaning of this, which again may be of use to welfare rights workers elsewhere who encounter such pointless statements in full written decisions.

In the meantime, keep up the good work with the Bulletin!

Yours faithfully

Matthew Brown
Welfare Rights Officer