

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. My decision is given under section 14(8)(b) of the Social Security Act 1998. It is:

I SET ASIDE the decision of the Wakefield appeal tribunal, held on 30 January 2006 under reference U/01/008/2005/02995, because it is erroneous in point of law.

I REMIT the case to a differently constituted appeal tribunal and DIRECT that tribunal to conduct a complete rehearing of the issues that are raised by the appeal and, subject to the tribunal's discretion under section 12(8)(a) of the 1998 Act, any other issues that merit consideration. In particular:

The appeal tribunal must investigate and determine the claimant's entitlement to a disability living allowance on his 'renewal' claim for an allowance in accordance with my analysis of the law.

In doing so, the tribunal must not take account of circumstances that were not obtaining at the time of the decision under appeal, which was made on 18 April 2005: see section 12(8)(b) of the Social Security Act 1998, as interpreted by the Tribunal of Commissioners in *R(DLA) 4/05*. Later evidence is admissible, provided that it relates to the time of the decision: *R(DLA) 2 and 3/01*.

The issue

2. The issue for me in this appeal is whether the claimant is entitled to the mobility component at the higher rate on account of the effects of his severe and prolonged migraines.

History

3. As far as I know, the claimant first claimed a disability living allowance in May 2002. He was awarded a disability living allowance for three years, ending on 15 May 2005. The award was made by a tribunal and consisted of the mobility component at the higher rate and the care component at the lowest rate. As there was no full statement of the tribunal's decision, I do not know what facts the tribunal found or how it directed itself in law.

4. In January 2005, the claimant submitted a 'renewal' claim. The Secretary of State obtained a factual report from the claimant's GP and advice from Medical Services before refusing the claim. The claimant exercised his right of appeal and the tribunal, by a majority, awarded a disability living allowance for a further three years. Again, the award consisted of the mobility component at the higher rate and the care component at the lowest rate.

5. The Secretary of State applied for leave to appeal to a Commissioner, which was granted by the district chairman who chaired the tribunal. The case was referred to me for case management directions. I directed observations from the parties. They have now been received and the case is ready for decision.

Why did the tribunal make the award?

6. The tribunal's reasons were set out by the chairman in his full statement of the tribunal's decision:

'The tribunal accepted that he clearly had a back problem which restricted his mobility but, echoing the view of the EMP who previously examined him, would not put this within the parameters of being virtually unable to walk taken on its own.

'The matter which taxed and troubled the Tribunal were the effects of the Appellant's headaches. The majority of the Tribunal concluded that there was nothing whatsoever to gainsay the frequency and severity with which these attacks occurred or indeed the level of disability that was caused. They noted that he had been consistent throughout in presenting information about his symptoms and that he was on strong analgesia. His estimate to the Tribunal was that he had severe headaches for at least 80 hours per week and only 3 days when he might have no pain. The severity of the headaches was sometimes such that he was bed bound for up to 3 days.

'The majority had regard to the decision of the Secretary of State's -v- Moyna made in the House of Lords which, in short, requires an overall view to be taken of the nature and effects of the Appellant's disability. The majority of the Tribunal found that for significance periods his headaches were so severe that he could do nothing more than sit or lie down and would then be unable to walk any distance at all outside, or be able to attend to the activity of preparing a main meal for himself.'

7. One member of the tribunal dissented on the facts. The chairman wrote:

'The Tribunal arrived at a majority decision because the minority expressed the view that the claim of being virtually unable to walk due to his back pain undermined his credibility and gave doubt in the mind of that member as to the duration and frequency of what the others regarded as being the main disabling condition.'

What is the relevant legislation?

8. Section 73(1)(a) of the Social Security Contributions and Benefits Act 1992 provides for entitlement to the mobility component at the higher rate if the claimant

'is suffering from physical disablement such that he is either unable to walk or virtually unable to do so'.

9. Section 73(5) authorises regulations to prescribe 'circumstances ... in which a person is to be taken to satisfy or not to satisfy a condition mentioned in subsection (1)(a)'. Regulation 12(1)(a) of the Social Security (Disability Living Allowance) Regulations 1991 is made under that authority. It provides:

'(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, without having regard to circumstances peculiar to that person as to the place of residence or as to place of, or nature of, employment-
- (i) he is unable to walk; or
 - (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; or
 - (iii) the exertion required to walk would constitute a danger to his life or would be likely to lead to a serious deterioration in his health'.

10. Section 73(8) of the Social Security Contributions and Benefits Act 1992 is also relevant. It provides:

'A person shall not be entitled to the mobility component for a period unless during most of that period his condition will be such as permits him from time to time to benefit from enhanced facilities for locomotion.'

How did the tribunal go wrong in law on regulation 12(1)?

11. The tribunal went wrong in law by failing to deal in sufficient detail with the claimant's migraines and their effects.

12. The majority of the tribunal accepted the claimant's account of his migraines. That account is contained in his claim pack, his letters and his oral evidence to the tribunal. His GP would only know the claimant's symptoms from what he was told, so it is reasonable to take the GP's evidence as repeating what the claimant had said. In the claim pack, the claimant wrote that during a migraine attack his balance and vision were affected (page 145). In a letter, he referred to pain, dizziness and nausea (page 182). He then says that the pain persists longer, but it is not clear whether he meant longer than the nausea or longer than the nausea and dizziness. He gave more detail in answer to the tribunal's questions (pages 194-201). His GP wrote that the migraines were frequent and could be severe and that symptoms varied from day to day (page 167).

13. The tribunal did not distinguish between the different effects of the claimant's migraines. It should have distinguished between the effect on vision, the effect on balance and, if it lasted longer than the effect on balance, the effect of the pain. By failing to draw these distinctions, the tribunal took irrelevant factors into account. It thereby went wrong in law.

14. The effect of the migraines on the claimant's vision had to be disregarded. This relates not to the act of walking, but to the direction of walking. As such, it is not relevant to the mobility component at the higher rate. That was decided by the House of Lords in *Lees v Secretary of State for Social Services* [1985] AC 930. (Difficulties in the direction of walking are covered by the mobility component at the lower rate under section 73(1)(d) of the Social Security Contributions and Benefits Act 1992.)

15. The effect of the migraines on the claimant's balance was relevant. This relates to the manner of the claimant's walking, which is one of the factors listed in regulation 12(1)(a)(ii).

16. It does not matter that the loss of balance may obtain before the claimant begins to walk and may persist during the time that he is walking. This was decided by Mr Commissioner Bano in *R(DLA) 4/04*. The Commissioner was concerned with a claimant whose mobility was limited by a painful claw foot. The Commissioner decided that it was not necessary for the severe discomfort to arise or worsen during walking. It was sufficient that it impeded the physical act of walking. That case concerned discomfort, but the principle applied by the Commissioner applies to any relevant factor.

17. The Secretary of State has relied on the decision of the Court of Appeal in *R(DLA) 6/99*. The Court was concerned with two cases in which the claimants had porphyria. The effect of this condition was that exposure to sunlight caused burning of the skin. It prevented the claimants walking outside during the day unless protected from sunlight. The Court decided that the claimants were neither unable to walk nor virtually unable to walk. They could not go outside to walk in sunlight, but that was not sufficient to satisfy regulation 12(1)(a)(ii). They would only do so if they experienced a physical difficulty in the act of walking. The claimants experienced discomfort on exposure to sunlight, but that was not relevant to regulation 12(1)(a)(ii). It was only concerned with discomfort that arose from the physical act of walking.

18. The circumstances of the claimant in this case are different from those in *R(DLA) 6/99*. The tribunal accepted his account of the effects of his migraines. He wrote that they affected his balance. Balance is part of the physical act of walking. This is recognised by the inclusion of manner of walking in regulation 12(1)(a)(ii). If sufficiently severe, it may prevent walking at all and be relevant to regulation 12(1)(a)(i).

19. The effect of the claimant's pain had to be disregarded. This does not affect the physical act of walking and is, on the authority of *R(DLA) 6/99*, irrelevant.

20. The claimant may consider that the distinctions I have drawn are over-refined and fail to take account of the reality of his migraines and their effects. I can understand why he may take that view, but the distinctions have to be drawn on the wording of the legislation and on the authorities.

21. The tribunal was correct to take account of the effect of the claimant's migraines on his balance. It was also correct to take an overall view of that effect. That was decided by the Commissioner in *R(A) 2/74, paragraph 35* and of the House of Lords in *Secretary of State for Work and Pensions v Moyna*, reported as *R(DLA) 7/03*. However, it was not sufficient just to record that the tribunal had done so. It had to investigate and make findings on the nature of the variation in so far as it affected the claimant's balance. It accepted the claimant's evidence, but that evidence did not sufficiently distinguish the different effects of the migraines. Accordingly, the tribunal went wrong in law.

How did the tribunal go wrong in law on section 73(8)?

22. The tribunal also went wrong in law by failing to consider section 73(8). It found that the claimant was affected by his migraines for 80 hours a week. Assume for the moment that

he was virtually unable to walk. The tribunal awarded a disability living allowance for three years. Would the claimant be able for most of that time to benefit from enhanced facilities for locomotion? He would be able to walk when he was not affected by his migraines. But that is not enough to satisfy section 73(8). When he was not affected, he would not need enhanced facilities for locomotion. In the case of conditions that are only intermittently disabling, the focus for section 73(8) is on the time when the claimant is experiencing the disablement. It is only during those periods that there would be any need for *enhanced* facilities for locomotion.

23. In this case, the claimant was disabled by his migraines. At those times, by his own evidence, he was severely incapacitated and sometimes confined to bed. On this evidence, he would not benefit from enhanced facilities for locomotion, because he could not go anywhere.

The mobility component at the lower rate

24. The Secretary of State has submitted that this does not arise on the facts (pages 236-237). However, there is evidence that the migraines can come on with little warning (page 146), which may occur when the claimant is walking. There is evidence that they impair his vision, which might affect his direction finding and require guidance. And there is evidence that he may fall (page 145), which would be relevant to the need for supervision under *R(DLA) 4/01*. If the tribunal finds that the claimant is not entitled to the mobility component at the higher rate, it must consider whether he is entitled to the lower rate.

The claimant's observations on the appeal

25. I have confined my decision to issues of law. I have not commented on the claimant's observations on the evidence (pages 227-231), some of which may have been more trenchantly expressed than the circumstances warrant. Those comments and the additional correspondence he has produced (pages 232-233) will be before the tribunal at the rehearing.

Why have I directed a rehearing?

26. I have directed a rehearing, because I cannot determine the claimant's proper entitlement to a disability living allowance without further investigation in the facts. That investigation is better undertaken by the qualified panel members of an appeal tribunal than by a legal Commissioner.

**Signed on original
on 19 July 2006**

**Edward Jacobs
Commissioner**