CDLA/2139/2003

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. My decision is that the decision of the tribunal is erroneous in point of law. I set aside the tribunal's decision and, since I consider it expedient to do so, I substitute my own decision awarding the claimant the higher rate of mobility component from and including 9 August 2001.

2. On 20 March 1997 the claimant suffered serious multiple injuries in a road traffic accident. On 9 August 2001, following advice from a disability adviser, he made a claim for disability living allowance, asking for the award to be backdated to the date of his accident. However, he now realistically accepts that there is no power to make an award of benefit for any period prior to the date of the claim.

3. The claimant suffered both physical and psychological damage as a result of his accident and asserted both mobility and care needs in his claim form. He was initially awarded lower rate mobility component, but although the claimant's injuries require almost constant care, he attends to those needs virtually unaided. In this appeal he challenges only the refusal of higher rate mobility component, and it is therefore only necessary to consider the injuries which affect the claimant's walking ability.

4. The claimant has been left with a claw foot, which he described on the claim form as being "extremely painful and stiff". He continued:

> **"The lubrication of my tendons does not work if I am still for any period of time and my foot locks up and is very painful. It is numb and hypersensitive together. When I first move I have to take care to overcome the pain and stiffness. I use specialised footwear. I hang on to furniture to help me or anything else within reach. I constantly rip off my toenails. When I walk, the sole of my foot swells up and is very painful"**

The claimant stated that the distance he could walk before feeling severe discomfort was 50 metres or less, that on average it would take him 10-15 minutes to walk that distance, and that he would have that amount of difficulty in walking on 3-4 days per week.

4. The claimant's general practitioner stated that the claimant's walking ability was not recorded (although the decision maker seems to have interpreted the doctor's rather cryptic entries on the report form as indicating that the claimant could walk 101-200m before the onset of severe discomfort). In view of the very sparse medical evidence, the first hearing of the appeal was adjourned for an examining medical officer's report to be obtained. On 9 April 2002 an examining medical officer reported, in relation to the claimant's walking ability, that on a good day the claimant would be able to walk 200 metres before the onset of severe discomfort, and on a bad day a few yards. He also stated that the claimant's speed of walking would be slow and that he would take 20 minutes to cover those distances.

5. The adjourned hearing of the appeal took place on 17 June 2002, but the decision of that tribunal was set aside under section 13(2) of the Social Security Act 1998. On 19 February 2003 a new tribunal, by a majority, dismissed the appeal . The statement of reasons for the decision was endorsed on the decision notice in the following terms:

> **"...The tribunal unanimously accepted that the appellant had a severe disablement which affected mobility. The issue was the technical requirements in order to fall within the category of being virtually unable to walk. The majority view was that the level of pain that the appellant suffers does not increase when he walks. The appellant himself admitted that the nature of the pain altered and found it difficult to explain how it increased. The appellant's unwillingness to use any form of aid also influenced the majority in deciding that he was not virtually unable to walk. The minority view was that the appellant did qualify and met the requirements. This was on two grounds. The findings of the EMP that the appellant had a substantial impairment of the right lower limb and that his opinion as to the speed of locomotion was so slow that the minority concluded that he qualified on this ground. Further the minority view was that even if pain levels did not increase that the increased incidence of the stabbing pain (of the three types the appellant had described) meant that walking was with severe discomfort and he fell within the definition. The fact that the appellant forces himself to walk despite pain the minority felt should not be held against him because it is established that all walking with severe discomfort should be disregarded."**

6. The claimant appealed, contending that the majority of the tribunal erred in holding that it is a condition of entitlement to higher rate mobility component that walking should bring about an increase in pain, and in taking into account the claimant's failure to use any form of walking aid. Following my grant of leave to appeal, the Secretary of State's representative supported the appeal, on the basis that the majority failed to make adequate findings of fact on the claimant's speed and manner of walking. However, the Secretary of State submitted that, in the light of *R(DLA)6/1999,* the majority of the tribunal were correct in their view it is only pain brought on by walking, and not pain from any other cause, which is relevant to higher rate mobility component, and that the claimant must show that severe discomfort arises from the act of walking.

7. Although I agree that it is only discomfort which is related to the physical act of walking which is relevant to entitlement to higher rate mobility component, I do not agree that such discomfort must first arise or must increase after walking has commenced. In *R(DIA)6/99* (*Hewitt v Chief Adjudication Officer, Diment v Chief Adjudication Officer)* the claimants suffered from porphyria, which is a condition which causes the skin to blister when exposed to sunlight. The Commissioner upheld the adjudication officers' appeals from decisions of appeal tribunals allowing claims for disability living allowance, holding that the "severe discomfort" referred to in regulation 12(1)(a)(ii) of the Social Security (Disability Living Allowance) Regulations 1991 must be brought on by the physical act of walking, and not merely by the fact of being out of doors. The Court of Appeal dismissed the claimants' appeals against the Commissioner's decision. Simon Brown LJ held:

> **"In my judgment, the language of regulation 12(1)(a), taken as a whole, points strongly to the physical difficulty having to be in the act of walking outside, and not merely in being outside"**

Ward LJ held:

> **"...the regulations must be aimed at, to borrow phrases from the speech of Lord Scarman in *Lees v Secretary of State for Social Services* [1985] AC 930 "physical difficulty in the act of walking", "the physical ability to move on foot", and a "limitation**

upon his physical capacity to move himself on foot"...the regulations have to be construed to being directed to the act of walking, not the fact of being out of doors."

9. As the minority member of the tribunal in this case observed, regulation 12(1)(a)(ii) of the 1991 Disability Living Allowance Regulations requires that walking which cannot be accomplished without severe discomfort is to be disregarded. However, the regulation does not require that severe discomfort is caused by walking. Although the Court of Appeal decided in *R(DLA) 6/96* that severe discomfort must arise from the physical act of walking, in the sense that it must not arise from some condition unconnected with walking, there is nothing in the judgment of the Court of Appeal to suggest that severe discomfort must first arise or increase after walking has commenced. Such a construction would lead to the absurdity that a claimant who began to experience severe discomfort after walking a short distance would be entitled to benefit, but a claimant who was constantly in severe discomfort because he was even more severely disabled would not qualify.

10. The tribunal accepted that the claimant's disablement affected his mobility. Although the claimant clearly had difficulty in describing to the tribunal how his discomfort increased or changed on walking, it seems to me to be very probable that it did so, since there would seem to be no other reason why on bad days the claimant should be unable to walk more than a few yards. However, for the reasons I have given, I do not consider that it was necessary for the tribunal to be satisfied that severe discomfort arose or increased after walking commenced. If the tribunal were satisfied that the claimant suffered from a physical disablement which affected the physical act of walking and which caused the claimant severe discomfort even when not walking, I agree with the minority member of the tribunal that any walking which the claimant was able to accomplish despite the discomfort was to be disregarded in applying regulation 12(1)(a)(ii) of the 1991 Disability Living Allowance regulations.

11. I therefore consider that the majority of the tribunal erred in holding that the claimant was not virtually unable to walk on the basis that his pain did not increase when walking. Since the tribunal appear to have accepted the claimant's evidence, I am unable to see why the claimant's refusal to use a walking aid was relevant. I therefore consider that the tribunal also erred in law in taking that matter into account. For those reasons, I allow the appeal and set aside the tribunal's decision.

12. The tribunal appear to have accepted the findings of the examining medical officer, and I see no reason not to accept them also. I therefore consider that it is expedient for me to make the findings of fact which are necessary to decide the claimant's entitlement to benefit.

13. The examining medical officer assessed the claimant's right lower limb as being "substantially impaired" and described the claimant's heel as being always in pain. There seems to me to be no reason to doubt the claimant's statement in the claim form that his foot is extremely painful and stiff, and that it is both numb and hypersensitive at the same time. Although the examining medical officer assessed the distances which he considered the claimant could walk on good days and bad days before the onset of severe discomfort, in view of his other findings, it seems very possible that those distances in fact represented his estimate of the absolute limits of the claimant's walking ability and that the claimant is, in fact, in severe discomfort all the time. If that is the case, for the reasons I have given, any walking which the claimant is able to achieve is to be disregarded. However, I also agree with the minority member that, even if that walking is taken into account, the extent of the

claimant's loss of function and the fact that on good days he takes 20 minutes to cover 200 metres and on bad days (which the claimant says are a majority) takes that time to cover a few yards leads to the conclusion that the claimant is virtually unable to walk, even assuming walking in a normal manner. I therefore make an award of higher rate mobility component. Since the claimant's condition appears to have stabilised, I make that award for an indefinite period.

14. For those reasons, my decision is as set out in paragraph 1.

(Signed) E A L BANO
Commissioner

12 March 2004