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CDLA/2367/2004

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. I find that the decision of the appeal tribunal ("the tribunal") given on 23 February 2004 was not erroneous in point of law. Accordingly, the claimant's appeal fails.

2. The claimant is a woman born 15 November 1958. Her stated disabilities are back pain and the consequences of a spinal fusion. She had an award of the higher rate of the mobility component from 7 December 2000 to 6 December 2003 inclusive. She submitted a renewal claim on 29 July 2003, to include the care component.. Her general practitioner submitted a medical report dated 17 August 2003, following which the decision maker decided that the claimant was not entitled to either component of disability living allowance, on 28 August 2003. The claimant made a late appeal, which was accepted.

3. On 20 November 2003, the claimant submitted a duplicate claim; it appears no decision was made on the grounds that the claim included the period from 20 November 2003, in respect of which the claimant already had an entitlement (page 179). The decision maker's decision on the claim of 29 July 2003 was reconsidered but not revised, and the appeal proceeded. The claimant submitted that there had been no change in her condition since the award for the previous claim had been made. Further medical evidence from a doctor in her general practice and her professor of orthopaedic surgery was submitted.

4. The tribunal met on 3 February 2004, the claimant being present and represented. The tribunal unanimously dismissed the claimant's appeal. The claimant appealed, with my leave, on the grounds that the tribunal had failed to consider adequately the claimant's evidence in respect of her inability to walk without severe discomfort. Further, the claimant's use of a microwave was not relevant. I granted leave for further consideration of whether the tribunal had given adequate reasons for preferring the general practitioner's evidence to that of the claimant.

6. The Secretary of State's representative does not support the appeal. He deals first with my point as to whether the tribunal preferred the evidence of the general practitioner to that of the claimant, submitting that the tribunal considered all the medical evidence available, including therefore that of the consultant, together with that of the claimant herself. The claimant explained that on three days a week she takes her elderly disabled father to a Day Centre, which involves a bus journey and walking estimated at about 150 yards. Twice a week the claimant herself travels by bus, train and walking to attend university.

7. The tribunal's Statement of Reasons extends to seven closely packed pages. It records:

> " 47. In any event the tribunal did not accept that the evidence supported [the claimant's] claim that her 'ability to walk out of doors without severe discomfort is so limited that she is virtually unable to walk'. Such a claim is not consistent with the evidence from her GP in 2003 and 2004. This GP has been responsible for treating [the claimant] since 1998, if not before. She stated unequivocally that in her view [the claimant] was not virtually unable to walk. [The professor of orthopaedic surgery's]

evidence does not assist on this point because he does not comment on the degree of leg pain that [the claimant] suffers or explain what is meant by 'any distance'. The tribunal noted that a different doctor in the GP practice expressed a different view in 2000, but considered that the detailed, repeated, and consistent views of [the claimant's] GP in 2003 and 2004 were to be preferred.

48. Nor is [the claimant's] claim consistent with the level of activities that she normally undertakes, in particular regularly travelling to and from university, walking within the university, and accompanying her father to the Day Centre. The tribunal accepted that on occasion [the claimant] may suffer severe discomfort after walking 60-70 yards or less and may be virtually unable to walk, but considered that this is not the case most the time."

In my judgment these two concluding paragraphs of the tribunal's assessment of the claim for the higher rate of the mobility component do show that the tribunal considered the overall evidence, made findings of fact and reached a decision which it was entitled to reach, and explained clearly the reasons for that decision.

8. It has been suggested there was some inconsistency in the tribunal's findings as to the distance the claimant could walk without severe discomfort. In paragraph 46 the tribunal stated it was not convinced that the claimant *normally* suffered disabling pain after 60 or 70 yds which amounts to severe discomfort. In paragraph 48 the tribunal accepted that *on occasion* the claimant may suffer severe discomfort after walking 70 yds or less and may be virtually unable to walk but considered that this was not the case most of the time. There is not therefore a fundamental discrepancy in the tribunal's findings.

9. The tribunal also dealt with the lower rate of the mobility component and concluded that the claimant was not so severely physically or mentally disabled that she reasonably required guidance or supervision from another person most of the time when she was walking outdoors on unfamiliar routes, but this aspect is not under appeal.

10. The claimant's second ground of appeal was that the use of the microwave in preparing a cooked main meal should be disregarded. This is an oversimplification of the position. The test is whether a claimant "cannot prepare a cooked main meal for himself if he has the ingredients". In the Secretary of State for Work and Pensions v. Moyna [2003] 4AER 162 R(DLA) 7/03, Lord Hoffman said of the "cooking test" that:

> "....its purpose is not to ascertain whether the applicant can survive, or enjoy a reasonable diet, without assistance. It is a notional test, a thought experiment, to calibrate the severity of the disability".

Thus we have moved from the position where a claimant might satisfy the criteria if s/he could not, most of the time, prepare a cooked main meal for one on a traditional cooker. The better view now is that it is more a question of what the claimant does with the microwave most of the time which will enable the appropriate decision to be made as to whether s/he satisfies the criteria for an award. It is clear that if the only activity that a claimant carries out with the microwave is to pierce a plastic lid, place the item in the microwave and adjust the controls, this will not equate to the preparation of a cooked main meal for one. If, however, the range of activities conducted by the claimant is, in broad terms, much the same whether or

not the meal is then cooked in or on a traditional cooker or in a microwave, there is no reason why the use of the microwave should not be taken into account. It will be borne in mind that it has long been held that it is not necessary for a claimant to be able to bend to the oven nor hold heavy pans to prepare a cooked main meal for one.

11. The claimant herself confirmed that she prepared meals for herself and her father, cooking most food including vegetables in the microwave, but cooking meat for her father on a grill, she herself being a vegan. The tribunal reviewed the claimant's evidence and that of her general practitioner and concluded that:

> 'In the light of the above evidence [the claimant] is able to prepare a cooked main meal for herself. The fact that she does it slowly has to sit rather than stand because of pain, to make adjustments as required and uses a microwave much of the time does not mean that she cannot prepare a cooked main meal for herself'.

I accept the submission on behalf of the Secretary of State that although this might have been more fully explained, the tribunal's conclusions in respect of the main meal test are perfectly adequate, and again, the tribunal reached a decision it was entitled to reach and there was no error of law in this respect. Although the claimant's representative submits that what is carried out for the claimant's father is not relevant, it is evidence of the claimant's abilities with regard to the preparation of a cooked main meal.

12. The tribunal recognised that the claimant did have difficulties and disabilities but that they were not, at the date of the decision appealed against, sufficient to satisfy the criteria for an award. It recognised that there is no presumption that the Secretary of State or the tribunal is bound by the decision made on an earlier claim but that it may be necessary for the tribunal to consider and refer to the earlier decision. It was mindful that the claimant said her condition had not improved and that she had previously had an award and explained why the award was not being renewed.

13. As I have said, on the findings of fact and the evidence in support of those findings, this was a decision the tribunal was entitled to make. It follows that the claimant's appeal cannot succeed.

(Signed) **E A Jupp**
Commissioner

(Dated) **29 October 2004**