<u>**SOCIAL SECURITY AND CHILD SUPPORT COMMISSIONERS**</u>

Commissioner's File No.: **CDLA/2973/1999**

Starred Decision No: 21/01

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Mr P Cichosz,
Office of the Social Security and Child Support Commissioners,
5th Floor, Newspaper House, 8-16 Great New Street, London EC4A 3BN.

so as to arrive by 4th June 2001

Comments on Northern Ireland Commissioners' decisions will be forwarded to the Northern Ireland Chief Commissioner.

1. This appeal, brought with leave of the tribunal chairman, succeeds. The decision of the Disability Appeal Tribunal on 21 9 98 was erroneous in point of law, for the reasons given below. However, I am satisfied that it is expedient, in exercise of my powers under s14(8)(a)(ii) of the Social Security Act 1998, for me to make further findings of fact and to give the decision I consider appropriate in the light of them. This is that the appellant (who sadly died on 14 8 99 of heart failure) was entitled to the higher rate mobility component of disability living allowance (DLA) from 28 2 97 to 14 8 99 inclusive.

2. I held an oral hearing at which the appellant was represented by Mr Roger Thompson, welfare rights officer of Tameside Metropolitan Borough, and the respondent by Mr Jeremy Heath of the Solicitors Office. In addition, Mrs B, the appellant's executor, came to the hearing. A copy of the grant of probate to her was produced and it was agreed that no appointment was necessary. Mrs B is a specialist diabetic nurse and the appellant's former partner. The couple split up 7 years ago, but remained in close touch. I found her evidence credible, informative and helpful. I am grateful to all concerned for their help at the hearing.

3. It was agreed that the point at issue was whether it could properly be said *on the evidence* that the appellant had been virtually unable to walk within s73(1)(a) of the Social Security Contributions and Benefits Act 1992 and regulation 12(1)(a)(iii) of the DLA Regulations 1991, ie that the exertion required to walk would be likely to lead to a serious deterioration in his health.

History and medical background

4. The appellant, who was born on 29 4 48 and therefore died at the extremely young age of 51, had suffered from the age of 15 from insulin-dependent diabetes mellitus. He had developed diabetic neuropathy (neuroarthropathy, according to the chiropodist at page 81b). Mrs B told me that, as also confirmed in the medical evidence among the papers, this had already led to osteomyelitis and Charcot's joint, where the bone decays and disintegrates. The condition is further described in the chiropodist's letter

and illustrated at page 63 by the examining medical practitioner (EMP). There is poor venous return of blood, deoxygenated blood pooling in the feet. Ulcers form, which can cause gangrene, with risk of amputation. The appellant had already had one toe amputated, and other joints had been resorbed. The ulcers are slow to heal: at the date of the chiropodist's letter, one had been in existence unhealed for 3 years. Moreover they form inwardly and may only reach the surface after a lapse of time. It was only because of the extreme care the appellant took in padding his foot before walking, and his regular chiropody treatment, that amputation of his right foot had latterly been avoided.

5. But because of the nature of neuropathy, no pain is felt except when an ulcer is severely infected. Mrs B told me that the appellant could walk at a reasonable speed with normal gait, except when an ulcer was so infected, when he would hobble or hop. Distance and time of walking were otherwise not a problem, *except* for the damage such walking could cause. The appellant told the EMP that he walked as if on cotton wool. It is not therefore possible for a sufferer to feel when he is doing himself damage; he will not know until later that an ulcer has formed or been exacerbated. Mrs B told me that there was a risk of deterioration each time the appellant walked, and she had first met him 16 years ago when he was in hospital on 3 months strict bedrest on account of his feet.

6. As well as the neuropathy, I add that the appellant had also had laser treatment for diabetic retinopathy, also caused by poor circulation, and that his early death may well have been due to cardiac myopathy stemming from the same source. His diabetes had therefore been attended by serious complications for some time.

7. My initial view on reading the papers was that since the tribunal had accepted the appellant could walk only 170 yards before the onset of severe discomfort, there must be some doubt about whether walking only this short distance would really lead to a serious deterioration in his health. However, it became apparent that this distance was a red herring. The appellant had said in his claim pack and told the tribunal that he could walk an unlimited distance without feeling severe discomfort. He had only said 170 yards to the EMP on being pressed to name some distance. He told the tribunal he

walked as little as possible. The medical evidence was that prolonged weight-bearing would damage his feet.

8. The tribunal had cited to it only the decision of Mr Commissioner Rice (CM/158/94) to the effect that the predecessor to regulation 12(1)(a)(iii) (the identically-worded regulation 3(1)(a)(iii) of the Mobility Allowance Regulations 1975) could only apply where there was a worsening of a claimant's condition from which he never recovered, or a worsening from which he only recovered after a significant period of time, eg 12 months, or a worsening from which recovery could only be effected by some form of medical intervention. The tribunal, on this basis, did not accept that regulation 12(1)(a)(iii) applied, and having found the appellant could walk 170 yards before stopping through severe discomfort, it not unnaturally found that subparagraph (a)(ii) did not apply either. No claim was made to any other component of DLA. The tribunal obviously had sympathy for the appellant, but I suspect it was misled, as I was initially, by the relatively short distance it found the appellant could walk without severe discomfort.

Arguments at the hearing

9. Against this factual background, which I accepted in full as set out in the preceding paragraphs, Mr Thompson's admirably succinct argument was that a dictionary definition of "exert" is "bring to bear". Clearly walking "exerts" pressure on the feet. In paragraph 14 of R(M)3/78 Mr Commissioner Watson stressed that what mattered under regulation 3(1)(a)(iii) of the Mobility Allowance Regulations was solely "the exertion required to walk", not any extraneous condition such as where a claimant might happen to be or conditions or symptoms which might intervene during the course of walking without there being any connection or relationship to or with walking. It was this exertion which must lead to a risk of serious deterioration in health. The Commissioner said "The expression includes, I think, a condition which might be induced, precipitated or aggravated by walking. It then has to be shown as a matter of probability that the exertion would...lead to a serious deterioration in health". This, Mr Thompson submitted, was the appellant's situation.

10. Mr Heath made it clear that he was not instructed to concede or support the appeal. But that said, and having reminded me that the

regulation required a "serious" deterioration in health, not merely a general deterioration, he suggested that the chiropodist's regular attention, so long as it was not just "first aid", might be "medical intervention" of the kind required by Mr Commissioner Rice. It might also be said that the ulcer which had not healed after 3 years could be a condition as envisaged by Mr Commissioner Rice from which recovery would take more than 12 months. I might find either of these conditions fulfilled, if I were satisfied on the evidence. I also needed to be satisfied that the appellant could from time to time benefit from enhanced facilities for locomotion under s73(8) of the 1992 Act. I observe that there did not seem to be much doubt about this, the appellant having retained possession of his mental powers and, because of the successful laser treatment to his eyes, his vision.

11. In CDLA/5494/97 Mr Commissioner Levenson considered an appeal by the Secretary of State. The claimant had been warned that excessive use of her spine would, because of the rod which had been inserted in it, cause wear on her lower lumbar disc which would lead to her eventually being confined to a wheelchair if she did not "pace herself". The tribunal had found that the effort of walking would cause a serious deterioration in her health. The adjudication officer argued that although walking might contribute to the general degenerative nature of her condition, this was not the same as finding that the exertion required to walk would lead to a deterioration in her health. Mr Heath pointed out that the Commissioner in paragraph 8 had dismissed this as an "artificial distinction".

12. Mr Commissioner Rowland in CDLA/17486/96 had also suggested that a reasonable fear by the claimant of damaging her back by walking might be a material consideration bringing regulation 12(1)(a)(iii) into play; though he was actually dealing with a case where severe discomfort was alleged.

13. Mr Heath, too, drew my attention to paragraph 14 of R(M)3/78.

My decision

14. I find *on the evidence in this case* that regulation 12(1)(a)(iii) was fulfilled from the date of claim until the appellant's death. Each time the appellant walked, he exerted ("brought to bear") pressure on his feet which

risked exacerbating the extensive damage he had already suffered, even though the neuropathy normally prevented the pain which would signal such damage from registering in his brain. He required regular medical intervention from his chiropodist to stave off the ever-present risk of amputation. He had an ulcer that remained unhealed after 3 years, despite all this care. I consider my decision to accord with that of Mr Commissioner Rice - who was dealing with the very different case of a sufferer from ME who was tired out by the exertion of walking and needed 2/3 days rest to recover, without medical intervention. The Commissioner very properly declined to disturb the tribunal's decision.

15. The present case also accords exactly with the type of condition postulated by Mr Commissioner Watson in R(M)3/78, in that the appellant suffered from a condition that *was* "precipitated or aggravated by walking" and that as a matter of probability would lead to a serious deterioration in his health. Amputation for anyone, let alone a man as young as the appellant, could hardly be regarded otherwise than as a serious deterioration in health.

16. The appellant's case is amply supported by Mr Commissioner Levenson's upholding of a decision which had found that the risk of wearing out her one remaining useful disc by the exertion of walking brought the claimant within regulation 12(1)(a)(iii). Mr Commissioner Rowland's recognition of a reasonable fear of causing serious injury as a material consideration is likewise supportive; and I am reminded of decisions on the incapacity benefit All Work Test which also recognise the force of medical advice against performing certain activities, even where it is possible for a claimant to do them.

17. R(M)1/78 was a completely different case, where a person who could walk a mile had been medically advised not to do so alone in case of epileptic seizures. The Commissioner rightly observed that to avoid walking for fear of the consequences if a seizure occurred was not a ground of entitlement to mobility allowance; but those seizures were unrelated to the exertion of walking.

18. As I have stressed, I reach my conclusion on the evidence in this case. I am emphatically not to be taken as holding that any sufferer from diabetic

or other neuropathy will by virtue of that condition alone be entitled to higher rate mobility component.

(signed) Christine Fellner
Commissioner

18 April 2000