

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. (1) I grant the claimant leave to appeal against the decision of the Disability Living Allowance Appeal Tribunal dated 7 May 2005 on Case No. U/03/194/2004/01712.

(2) As empowered by regulation 11(3) of the Social Security Commissioners (Procedure) Regulations 1999 I treat and determine the application for leave to appeal as the appeal.

(3) My decision on the appeal is that the tribunal's decision is erroneous in law. I set that decision aside and, as empowered by section 14(8)(a)(ii) of the Social Security Act 1998, I give my own decision which is:-

The claimant is entitled to the mobility component of disability living allowance at the higher rate from and including 7 May 2004.

2. The claimant appeals, with my leave, against the tribunal's decision that the claimant is not entitled to an award of either component of disability living allowance from and including 7 May 2004.

3. The only issue raised by the claimant's appeal to me is whether or not the tribunal was wrong in law to decide that the claimant is not virtually unable to walk within the meaning of section 73(1)(a) of the Social Security Contributions and Benefits Act 1992 as read with regulation 12(1)(a)(iii) of the Social Security (Disability Living Allowance) Regulations 1991.

THE LEGISLATION

4. Insofar as relevant to this appeal section 73 of the 1992 Act provides:-

“ (1) Subject to the provisions of this Act, a person shall be entitled to the mobility component of a disability living allowance for any period in which he is over the relevant age and throughout which –

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

.....

(5) ..., circumstances may be prescribed in which a person is to be taken to satisfy or not to satisfy a condition mentioned in sub-section (1)(a) ... above.

.....”.

The relevant part of regulation 12 is:-

“ (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) ...; or

(ii) ...; 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; ...

.....”

FACTUAL BACKGROUND

5. The facts of the case are adequately explained in the following paragraphs from the statement of the tribunal’s reasons for its decision: -

“3. [The claimant] suffers from a problem with her left knee, the effects of which are well summarised in the letter dated 26.05.05 from [Mr M], Consultant Orthopaedic Surgeon. There is some arthritis in her right knee also, but not as bad as in her left knee. The period under consideration by the Tribunal was the period from early February 2004 (3 months before the date of claim) to early August 04 (the date of the decision under appeal). In that period, [the claimant] told the Tribunal, she was getting a lot of swelling and a lot of pain, and her knee was sometimes ‘locking’. She could not put a lot of pressure on the knee. She has had ‘wash-outs’ (arthroscopies) of the knee, the most recent of these has been in February 2005. At the date of the hearing, there were no specific plans for her to have another. Inbetween wash-outs, the knee was ‘OK’ at first, but after a time using it it began to hurt and ache; more bits having broken off. The problem with the knee ‘locking’ had decreased since she had first had the wash-outs and had not happened at all since the last of these, when some torn cartilage had been trimmed away. She could not remember precisely when she had first had a wash-out, but she thought she had one in January 03.

4. [The claimant’s] difficulties with walking are exacerbated by her personal circumstances. She has young children, who attend different schools, necessitating several separate journeys on foot each day, amounting to 3 miles in total, in the very hilly area in which she lives, but at around the time that she applied for DLA her mother-in-law had to some extent taken over this task, though, according to her evidence to the Tribunal of 9.02.05 [the claimant] would take the children herself on occasions. During the period under consideration by the Tribunal, [the claimant] did very little walking. She would occasionally go into [] with her mother, and go round the shops with her for about an hour. When [the claimant] was examined by an EMP on 30.07.04, she is recorded as having said that she could walk about 150m and

would then sit. The examining doctor found firm skin on her feet indicative of walking. They considered that she could walk '200m+', rather slowly, with a slight limp. Having regard to all the evidence, the Tribunal concludes that [the claimant's] ability to walk before the onset of severe discomfort was not so limited as to be trivial or insignificant, and that she was not 'virtually unable to walk' within the meaning of regulation 12(1)(a)(ii).

5. There remains to consider the submission in respect of reg 12(1)(a)(iii). This provision confers entitlement to a higher rate of the mobility component where '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'. The opening words of reg 12 make clear that this is to be judged 'without having regard to circumstances peculiar to that person as to the place of residence ...'

The Tribunal therefore cannot take into account the fact that [the claimant] lives in a particularly hilly locality. The Tribunal is asked to find that reg 12(1)(a)(iii) applies to [the claimant] on the basis that 'exertion' (in the sense of the pressure brought to bear on the knees by walking; see CDLA/2973/99) would lead to a serious deterioration in her health. It is submitted that since 'serious deterioration' has been said to be established by 'a worsening from which recovery could only be effected by some form of medical intervention', the effect of extensive walking in accelerating the need for further 'wash-outs' and, ultimately but prematurely, a knee replacement (see document 125) should be found to bring [the claimant] within reg (12)(1)(a)(iii).

6. The Tribunal did not accept this submission. The reference to 'serious deterioration' appears in the same sub-paragraph as and as an alternative to 'a danger to life'. In the view of the Tribunal this indicates the gravity of the consequences that must be shown to flow from the exertion in order for this provision to apply; as exemplified in CDLA/2973/99 (risk of amputation of feet). The Tribunal takes the view that, in a case where the serious deterioration is said to be deterioration recovery from which will require medical intervention, it is also appropriate to consider the nature of the medical intervention that may be needed. This need not be emergency intervention, but must be intervention that could itself be regarded as neither minor nor routine. It seems clear that, unless [the claimant] were to refrain from all weight-bearing, both indoors and out, which she is clearly not willing or able to do, she will require further medical intervention at regular intervals in any event, even if her walking outdoors is kept to a minimum. However, the type of weight-bearing that she has been particularly advised to reduce, is walking up and downstairs and hills; features of [the claimant's] circumstances which, as already indicated, the Tribunal is not permitted to take into account. The Tribunal must consider whether 'ordinary' outdoor walking brings [the claimant] within reg 12(1)(a)(iii). It finds that it does not. Walking is likely to accelerate rather than cause a need for further medical intervention and, as indicated above, the Tribunal considers it right to take into account also the nature of that intervention, which, though unpleasant and temporarily disabling, is essentially a routine procedure.

7. The Tribunal is fortified in its overall conclusion by the fact that, although [the claimant] has to use crutches immediately after a wash-out, she has not been advised to use them all the time as a means of avoiding pressure on the knee when mobilising.

Rather, she has been advised against using them continuously, for the sake of maintaining function of the muscles around the knee. Similarly, although she has a walking stick, she does not use this all the time to relieve pressure on the knee. In these circumstances, the Tribunal finds that [the claimant] does not fall within regulation 12(1)(a)(iii). The appeal therefore fails.”

6. Document 125 of the appeal bundle, referred to in the statement of reasons, is a letter dated 26 May 2005 to the claimant from her consultant surgeon. Document 93 is a report by the surgeon dated 18 May 2004. The report is as follows:-

“30 year old re-referred with problems with her left knee. Complains of pain in the knee and also indicates that it seizes up and won’t move. Had a previous arthroscopy which demonstrated synovial chondromatosis and removal of some loose bodies.

O.E. the legs appear normally aligned. The left knee appears dry, i.e. no effusion. Extension is full. Flexion is full. There is discomfort in the lateral side of the joint adjacent to the patella and X-rays confirm the presence of synovial chondromatosis and multiple loose bodies.

I have explained that she will have ongoing problems with this left knee in perpetuity essentially because her joint line will continue to make loose bodies and that she will require repeated attention in the long term. I have also explained the issue about weight loss and maintaining the weight loss.

Waiting list for arthroscopy, removal of loose bodies, left knee.

I have also pointed out that the more stairs she has to climb and the hills to ascend the more trouble the knee will inevitably give her in the long term and ideally she would be living where she has no need to climb hills or stairs.”.

The letter reads: -

“I write to confirm my previously expressed view that you have a chronic condition with your left knee where the lining of the joint will continue to develop loose bodies. These will inevitably accumulate and grind within the joint surfaces of the knee leading to premature osteoarthritis of the knee and you will require repeated attention in the long-term to try and carry out repeated operations to remove these loose bodies from time to time.

It would be to your benefit to be able to reduce the amount of walking you do, particularly up and down hills or stairs, and over the time the knee will certainly cause significant deterioration in health and in function. It is my view that, in the long-term, you are likely to require a knee replacement rather earlier than would normally be the case.”.

GROUND OF APPEAL

7. In her statement of her grounds for appealing the tribunal’s decision to a Commissioner the claimant says: -

"I believe the tribunal has not adequately addressed the point in 12(1)(a)(iii) set out in the submission.

Walking (on the level/hills) directly leads to the need for another operation. The consultant has said that he will require me to be totally immobile before he will operate again. This point will be preceded by about 6 months of waiting.

I consider that this equates to meeting the regulation in question. As the regulation is somewhat open-ended, I have used CDLA/2973/99 as a benchmark for the term 'exertion' and I do not believe the tribunal has considered this point fully and have therefore misinterpreted the law.

I would be grateful to have a Commissioner's opinion/decision on the current meaning of the regulation."

8. Before I would determine the application for leave to appeal I directed the Secretary of State's representative to supply a submission as to the guidance on the interpretation of regulation 12(1)(a)(iii) to be found in Commissioners' decisions CDLA/5494/1997, CDLA/2973/1999, CM/23/1985 and CM/158/94 and as to the advice which is given to examining medical practitioners about what would constitute serious deterioration in health within the meaning of head (iii) of paragraph (1)(a) of the regulation.

COMMISSIONERS' DECISIONS

9. In response to my direction of 14 December 2005 the Secretary of State's representative has provided a submission dated 16 January 2006 in which she gives a useful summary of the Commissioner's decisions to which I referred in my direction. In CM/158/1994 the Commissioner approved of the tribunal's conclusion that –

"Although exertion did leave [the claimant] very exhausted, it did not result in a serious deterioration in his health since, having rested, he would improve."

In that case the claimant needed to rest for 2 or 3 days to recover from walking. The Commissioner's view was that "deterioration in health would only arise where:-

- " (a) There was a worsening of his condition from which he never recovered, or
- (b) there was a worsening from which he only recovered after a significant period of time e.g. 12 months, or
- (c) there was a worsening from which recovery could only be effected by some form of medical intervention."

I assume that the Commissioner's omission of the word "serious" was a slip of the pen.

10. In CDLA/2973/1999 the claimant suffered from diabetes which had given rise to neuropathy in the feet and a propensity to ulcers in the feet. Applying the criteria enunciated in CM/158/1994 the tribunal accepted that walking involved pressure on the feet and that such

pressure was exertion which risked exacerbation of the ulcers. That exacerbation would require regular medical intervention from a chiropodist to stave off the ever present risk of amputation. Amputation would be a worsening of the claimant's condition brought on by the act of walking.

11. In CDLA/5494/1997 the tribunal had made the following findings in fact:-

“The appellant has [had] a Harrington's rod in her spine since the age of 14 to correct a childhood scoliosis. This fixes the spine and means that the lower lumbar disc will have excessive wear on it. She has been advised by the consultant that excessive use of the spine will lead to her eventually being confined to a wheelchair unless she 'paces herself'. This advice was given about 2 years ago. She awaits a further appointment for the consultant. She takes a maximum dose of medium strong painkiller (8 Tylex per day). She needs help with bathing and occasionally on the stairs.”.

The tribunal's reason for concluding that on those facts head (iii) of regulation 12(1)(a) applied to the claimant was:-

“On the balance of probabilities therefore the tribunal find that the effort of walking would cause a serious deterioration in her health i.e. being confined to a wheelchair and she therefore qualifies for a higher rate mobility component as per box 1.”.

The Commissioner rejected a submission on behalf of the Secretary of State to the effect that the claimant's evidence was that it was excessive use of the spine and not the exertion required to walk which would eventually lead to a deterioration in the claimant's health and that, therefore, walking might contribute to the general degenerative nature of the claimant's condition which was not the same thing as the exertion required to walk leading to a deterioration in the claimant's health. The Commissioner thought that the adjudication officer was making an artificial distinction. The clear implication of the tribunal's findings was that the tribunal accepted that the claimant's condition was prone to deterioration if she did not preserve her spine by pacing herself and it was a fair inference that the exertion or effort used in the walking would wear the remaining free disc at the base of the spine.

12. The only significance, for this appeal, of CM/23/1985 is that it might be read as indicating that the Commissioner would have disagreed with the later decision on CM/158/1994 in that he said that it was an error in law for the tribunal concerned to have thought that the then equivalent of head (iii), which was in exactly the same terms as the current provision, referred to a deterioration in health persisting for at least 12 months. There was nothing in the regulations then in force to justify that interpretation. However, the 12 months mentioned in criteria (b) of CM/158/1994 which I quote above is not absolute. It is an example of what could be a significant period of time.

13. The conclusion which the Secretary of State's representative draws from those Commissioners' decisions is that the worsening in the claimant's condition must be brought on by the act of walking and that the claimant will come within the criteria enunciated in those decisions if she is able to walk but refrains from doing so in order to preserve her condition as long as possible.

DEPARTMENTAL GUIDANCE TO EXAMINING MEDICAL PRACTITIONERS

14. The Secretary of State's representative sets out also in her submission the advice which she has received from the Corporate Medical Group of the Department for Work and Pensions by way of examples of what the Group considers to be serious or not serious deterioration in a claimant's health. The first example of a relevant condition suggested by the Group is a serious cardiac deficiency constituted by either an aortic aneurysm on the point of rupture or a Berry aneurysm in the Circle of Willis. In either case the exertion of walking might cause the weakened blood vessel to rupture. However, in either case the condition could be asymptomatic and undiagnosed until the rupture occurred but if diagnosed would immediately be treated surgically.

15. The second example given is that of the diabetic with peripheral neuropathy, which causes numbness in the feet. Because of the numbness rubbing by ill-fitting shoes could go undetected and result in ulcers: but a person with diabetes should be paying particular attention to the care of his feet which is part of the established management of diabetes. The third example given by the Group is the person with osteoarthritis of the knee which the Group regards as a relatively minor condition not impinging on the whole health of the person. In such a case it is not the effort of walking so much as the act of walking which is relevant. It is important to keep an arthritic joint mobile but the sufferer would be limited by pain in the joint. That is not regarded as constituting a serious deterioration in health.

THE CASE FOR THE SECRETARY OF STATE

16. The Secretary of State's representative notes that in this case the claimant has arthritis in her left knee, and to a lesser degree in her right knee. Wash-outs to the knee have helped her. Walking makes the condition worse and her consultant orthopaedic surgeon states that she will require operations in perpetuity. She argues that in view of the advice given by the Corporate Medical Group it does not appear that the claimant's health will deteriorate to such an extent as to amount to "serious deterioration" within the meaning of regulation 12(1)(a)(iii).

CLAIMANT'S OBSERVATIONS

17. The claimant's observations on the submission for the Secretary of State, take issue with the medical advice given to the Secretary of State's representative. It is argued that although arthritis may be a minor medical condition by comparison with a brain haemorrhage the impact of arthritis on a person's care and mobility may be considerable and more DLA awards go to people with arthritis than to those with any other condition according to statistics produced by the Department for Work and Pensions. The claimant is affected by pain in the knee joint and walking worsens her condition over time. The seized knee constitutes a serious deterioration in her health and it is the act of walking which causes the seizure. The only remedy is medical intervention under general anaesthetic. The Collins Concise Dictionary defines bodily health as "the state of being bodily and mentally vigorous and free from disease" and "the general condition of body and mind". The reference in the penultimate paragraph of the submission for the Secretary of State to the consultant surgeon's prognosis of operations in perpetuity is somewhat misleading because what that prognosis involves is a

new general practitioner's assessment and referral, but only after the knee has seized up, a wait of 9 months for another operation, an operation under general anaesthetic and then a two week recovery period before mobility is restored. The surgeon has stated that the knee must have reached the point of seizure before the referral cycle can begin again. The claimant is unable to pre-book operations in anticipation of her needs and she does not have the resources to reduce the waiting time through recourse to private treatment.

18. I granted leave to appeal because the grounds of appeal stated for the claimant and the points made in the claimant's observations on the submission for the Secretary of State seemed to me to be arguable. I obtained the regulation 11(3) consents referred to in paragraph 1(3) above.

CONSIDERATION

19. Whether or not the exertion required to walk would be likely to lead to a serious deterioration in a claimant's health is a question of fact for the Secretary of State's decision-maker or, on appeal from him, for the tribunal. However, I think that the tribunal's decision in this case is erroneous in law in respect of two matters. The first error is that although it is quite clear that the tribunal took note of the claimant's surgeon's opinion, expressed in his letter to the claimant, that walking would eventually bring about the need for a knee replacement operation "rather earlier than would normally be the case" it is not clear from the statement of the tribunal's reasons for its decision what the tribunal made of the surgeon's opinion that "... over time the knee will certainly cause significant deterioration in health and in function.". I do not think that "significant" as used by the surgeon means anything different from "serious" and his use of the expression "deterioration in health" raises the probability, at the very least, that the surgeon was directing his mind to the statutory test enacted in regulation 12(1)(a)(iii).

20. The second error is that the tribunal has misdirected itself in law in its interpretation of head (iii) of regulation 12(1)(a). The tribunal was correct to decide that the "or" in head (iii) is disjunctive and not conjunctive. A provision that the exertion of walking, to render the claimant unable or virtually unable to walk, must both constitute a danger to her life and be likely to lead to a serious deterioration in her health would seem to me to make no sense. The danger to life and the likelihood of serious deterioration in health are therefore, as the tribunal thought, alternative criteria. The tribunal's mistake was to try to judge what is meant by "serious" in the second alternative by reference to the risk of death contemplated in the first alternative. I say that for two reasons. Firstly, had the draftsman of the provision intended that the qualifying criterion was to be the risk of death or something akin to the risk of death he could have drafted head (iii) in terms which specified those similar or near similar levels of risk but what has been enacted is a first alternative of the risk of death and a second alternative of the lesser risk of serious deterioration in health. Secondly, it is contrary to authority to construe the second alternative in a statutory provision as being coloured in its importance, gravity or nature by the importance etc. of the first alternative (R v. Marcus [1981] 2 All ER 833). It is on account of the errors identified in this and in the foregoing paragraph that I have set the tribunal's decision aside.

21. The facts of this case are sufficiently clear from the papers for me to make my own decision. I think that "health" as used in head (iii) of regulation 12(1)(a) means no more than

the general well-being, physical and mental, of the claimant. If a more technical definition of "health" is required it is to be found in Blakiston's Gould Medical Dictionary as:-

- “ 1. The state of dynamic equilibrium between the organism and its environment which maintains the structural and functional integrity of the organism within the normal limits for the particular form of life (race, genus, species) and the particular phase of its life cycle.
2. The state of being sound in body and mind; well being.”.

Because of the opening reference to "physical condition as a whole" in sub-paragraph (a) of regulation 12(1) "health" may not include mental health but that does not matter for the purposes of this case.

22. In referring to the claimant's arthritis and the associated pain the advice received by the Secretary of State's representative from the corporate medical services seems to imply that for the purposes of head (iii) the act of walking is different from the exertion of walking. As a point of statutory interpretation, as distinct from a matter of medical science, that is not so. When a person calls into play the weight bearing muscles and joints to take the weight of her body on her feet and repeatedly places one foot in front of the other, transferring the weight alternatively from one foot to the other, in order to make progress on foot she is exerting herself within the meaning of head (iii), however slight may be the exertion. The distinction implied in the medical advice puts a restriction on the meaning of "exertion" which is not warranted by the context or the purpose of the provision.

23. There is undisputed evidence that the effect of walking, in other words the effect of the claimant's exerting herself (however slightly) in order to walk, is that the left knee joint becomes cluttered with debris which causes limiting pain and locking in the knee and eventually necessitates hospitalisation for the knee to be washed-out. The evidence for the claimant including that submitted since the tribunal hearing, is that the period between the knee reaching the condition in which a wash-out is necessary and the point at which the claimant has recovered fully from the operation and is walking normally is a period of a considerable number of months. The operation requires a general anaesthetic. Although the claimant seems to have been advised to walk in order to maintain muscle bulk she has also been advised that if she does not restrict her walking, particularly but not exclusively on hills and stairs, she will need a knee joint replacement sooner than would otherwise be the case. Her surgeon's view is that the sequence of deterioration in the knee followed by wash-outs, recovery and further deterioration and wash-outs will be repeated until the knee replacement takes place.

24. It was the tribunal's judgment that the process described does not amount to serious deterioration in the claimant's health. That was not unreasonable in the light of the tribunal's understanding that "serious" in head (iii) was something akin to danger to life. However, in my judgment, treating the second alternative in head (iii) as a freestanding alternative, anything which gives rise to repeated invasive surgery, repeated general anaesthetics, repeated periods of restricted mobility or total immobility and a knee replacement operation sooner, rather than later leads to a serious deterioration in health. I have no doubt that the tribunal is correct in saying that the arthroscopies and wash-outs are "routine" in the sense that they are procedures frequently undertaken by surgeons. Probably the knee replacement operation can

also be regarded as “routine” in that sense. However, while such procedures can be said to be routine for the surgeons experienced in performing them I do not think that there is any invasive surgical procedure which is routine for the patient and I would certainly not accept that repeated general anaesthetics or knee replacement operations are routine. The evidence of the claimant and her consultant surgeon establishes that the exertion of walking, including walking on the level, will increase the frequency of the need for arthroscopies, wash-outs and general anaesthetics. It will also advance the date at which she will require to undergo a knee replacement operation. Advancing the date of the knee replacement increases the likelihood of the need for a repeat knee replacement in old age when the claimant may be less able to cope with the anaesthetic involved and the process of recuperation. My conclusion is, therefore, that the exertion of walking is likely to lead to a serious deterioration in her health.

25. For the foregoing reasons the claimant’s appeal succeeds and my decision is in paragraph 1 above.

**(Signed) R J C Angus
Commissioner**

(Date) 16 June 2006