

Starred Decision No.: 102/01



THE SOCIAL SECURITY COMMISSIONERS

Commissioner's Case No: CDLA/97/2001

SOCIAL SECURITY ACTS 1992-1998

**APPEAL FROM DECISION OF AN APPEAL TRIBUNAL ON A QUESTION OF
LAW**

DECISION OF THE SOCIAL SECURITY COMMISSIONER

COMMISSIONER: Mr C. Turnbull

1. This is an appeal by the Claimant, brought with my leave, against a decision of the Coventry Appeal Tribunal made on 29 September 2000. For the reasons set out below that decision was in my judgment erroneous in law. I allow the appeal, aside the Tribunal's decision and remit the matter for redetermination by a differently constituted tribunal in accordance with the directions given in paragraphs 23 and 24 below.
2. I held an oral hearing of this appeal at which the Claimant was represented (as he had been before the Tribunal) by Ms. Wilcox from the Warwickshire Welfare Rights Advice Service and the Secretary of State was represented by Mr. Heath of the Office of the Solicitor to the Department of Work and Pensions.
3. The Claimant is a man now aged 57 who suffered a very bad injury to his left leg, and in particular the knee joint, in a road traffic accident when he was 19, as a result of which he often wears a calliper to support his left knee and has to use elbow crutches to support him when standing and walking.
4. On 1 July 1999 he made a claim for disability living allowance. That claim was refused on 3 September 1999, and on 7 January 2000 that decision was looked at again but not changed. The Claimant's appeal to the Tribunal was partially successful in that he was awarded the lowest rate of the care component (for inability to prepare a cooked main meal) from 1 July 1999 to 30 June 2004.
5. The Claimant sought leave to appeal the Tribunal's decision, contending that the Tribunal had erred in law in dealing with the mobility component.
6. In a written submission placed before the Tribunal by Ms Wilcox it was contended (i) that the Claimant's ability to walk without crutches was so limited as to mean that he was "virtually unable to walk" and (ii)(a) that when using crutches he did not (and was not able for any significant distance to) put his left leg to the ground, with the result that (b) his manner of making progress on foot with crutches did not amount to "walking" and so in effect had to be ignored. However, as to (ii)(a) the chairman put to the Claimant at the hearing that he had seen the Claimant walk along a corridor with his crutches and "putting both feet to the ground during his walking motion". The Claimant's response was that he did not put any weight on his left leg.
7. The Tribunal did not in its reasons specifically deal with the Claimant's ability to walk without crutches. As regards his ability to move on foot with crutches, it found as a fact that he did apply both feet to the ground, but, as I read its reasons, made no finding on the question whether his left leg bore any weight. The Tribunal held that the Claimant "could walk in the ordinary meaning of the word in that at least one foot would always be on the ground", and that his ability so to walk was such that, taking into account the factors in Reg. 12(1)(a)(ii) of the Social Security (Disability Living

Allowance) Regulations 1991 (“the 1991 Regulations”), he was not “virtually unable to walk.”

8. Ms. Wilcox contends on the Claimant’s behalf in this appeal:

- (1) That it is established by Commissioners’ decisions, and in particular R(M) 2/89, that a person who can only make progress on crutches if he “swings through” with one leg – i.e. does not place that foot on the ground – is not thereby “walking”;
- (2) That the same must apply to a person who, although the foot on his bad leg does rest on the ground, does not place (and could not without severe discomfort place) any weight on that leg.
- (3) That the Tribunal therefore erred in law in assuming that the Claimant was “walking” whether or not he was able to place weight on his left leg, and in not making findings as to whether he did or was able to place weight on that leg.

9. As I read the very brief written submission in this appeal of the Secretary of State’s then representative, he in effect accepted Ms. Wilcox’ above contentions. In particular, he submitted that further findings of fact (i.e. as to the Claimant’s ability to put weight on his left leg) were necessary in order to determine whether the Claimant was “unable to walk”, and that the case should be remitted to a new tribunal for that purpose.

10. Notwithstanding that the appeal was supported, I directed the oral hearing because it seemed to me that issues of some general significance might be involved.

11. Mr. Heath’s broad initial submissions at the hearing before me were:

- (a) That the Tribunal’s finding that the Claimant placed both feet on the ground (alternately) when using his crutches meant that he was not “unable to walk”; but
- (b) That the extent (if at all) to which his left leg was weight bearing was an aspect of the manner in which he walked, and thus a factor which Reg. 12(1)(a)(i) of the 1991 Regulations required to be taken into account in determining whether he was “virtually unable to walk.”

12. I explored with Mr. Heath the precise extent to which, in making his submission (a), he was disagreeing with the first and second of Ms. Wilcox’ submissions (as summarised in para. 8 above). I hope I summarise his answers correctly as follows:

- (i) He did not accept that previous Commissioners’ decisions were properly regarded as having decided that, as a matter of law, a person who is able

only to “swing through” with the bad leg is not “walking” and is therefore “unable to walk.”

- (ii) If and to the extent that any previous decision did so decide, it was wrong;
- (iii) In any event, a person who does or can place his feet on the ground alternately when progressing with crutches is “walking” and is therefore not “unable to walk”, whether or not he does (or can) place any weight on the bad leg.

13. At this point I should set out the few relevant provisions of the legislation. By s.73(1)(a) and (11) of the Social Security Contributions and Benefits Act 1992 a person is entitled to the mobility component at the higher rate if he “is suffering from physical disablement such that he is either unable to walk or virtually unable to do so.” By Reg. 12 of the 1991 Regulations:

“(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; or
- (b) he has both legs amputated at levels which are either through or above the ankle, or he has one leg so amputated and is without the other leg, or is without both legs to the same extent as if it, or they, had been amputated.

(4) Except in a case to which paragraph (1)(b) applies, a person is to be taken not to satisfy the conditions mentioned in section 73(1)(a) of the Act if he –

- (a) is not unable or virtually unable to walk with a prosthesis or artificial aid which he habitually wears or uses, or
- (b) would not be unable or virtually unable to walk if he wore or used a prosthesis or artificial aid which is suitable in his case.”

14. In my judgment R(M) 2/89 is clear authority for the proposition that a person who can only make progress on crutches by “swinging through” with one leg is not thereby “walking”, and so (if he cannot walk at all without crutches) is “unable to

walk.” I note that it is cited as authority for that proposition in para. 61308 of the Decision Makers Guide. I therefore reject Mr. Heath’s first submission.

15. Further, although I have some sympathy for Mr. Heath’s submission that many people would regard a person who “swings through” with the bad leg as “walking” with the aid of crutches, the decision arrived at in R(M) 2/89, which was strongly supported by the reasoning in the earlier decisions in CM/67/1981 and R(M) 3/78, is a perfectly tenable one. Many decisions of decision makers and appeal tribunals must have been reached in reliance on it. It would create a hopeless degree of uncertainty in the law were I not to follow it. I therefore follow it and reject Mr. Heath’s second submission.

16. The remaining point is whether the reasoning in R(M) 2/89 applies equally to a person who does place his feet on the ground alternately but without any weight ever being placed on one of the legs. In that decision the Commissioner said:

“..... it seems to me that the test adopted by the members of the tribunal, namely to have a one legged man progress by way of his crutches, and the finding that he failed to qualify for mobility allowance because the members of the tribunal could find no physical disability of his good leg or arms which would prevent satisfactory “crutch walking” on that one leg were such that no tribunal, acquainted with the ordinary use of language, could reasonably impose such a test or reach that decision. In my judgment the tribunal looked to the claimant’s ability to progress rather than his ability to walk. “Walk” is an ordinary English word. The meaning given in Collins English Dictionary is, “to advance in such a manner that at least one foot is always on the ground” and in Websters Dictionary the following is material, “of a biped to move along leisurely on foot with alternate steps.” In the Shorter Oxford English Dictionary the following meaning is given, “of human beings or other bipeds: to progress by alternate movements of the legs so that one of the feet is always on the ground” and the text refers that in the case of a quadruped there are always two feet on the ground. It seems to me that in the context of regulation 3 [the predecessor of regulation 12 of the 1991 Regulations] walk must be limited in this way. It appears to me in the instant case that the tribunal substituted the concept of progress for that of walking. A man with two legs, who has to use crutches, may manage himself in such a way as to walk, but not so a person with one leg only.”

17. R(M) 1/90 contains a specific reference to weight bearing relied on by Ms. Wilcox. The decision concerned a person who could only walk with physical assistance from another person. The Commissioner said:

“7. According to the Shorter Oxford Dictionary the meaning of “to walk” in relation to human beings or other bipeds is “to progress by alternate movements of the legs, so that one of the feet is always on the ground.” In *Lees v Secretary of State for Social Services* [1985] 1 AC 930 the House of Lords held that the requirement of guidance in the case of a blind person with impaired capacity for spatial orientation does not detract from ability to walk. The leading opinion was delivered by Lord Scarman. In the course of his speech Lord Scarman observed:-

“Walk” is, of course, an ordinary English word; but the task which faces your

Lordships is to determine its meaning in the context of section 37A of the 1975 Act and of the regulations made thereunder. That is a matter of law to be determined by applying the judicial process of statutory interpretation to the section and to the regulation.”

Later in his speech Lord Scarman rejected an argument that regulation 3(1)(b) of the Mobility Allowance Regulations entitled a person who could not walk out of doors unaided to be held to be virtually unable to walk. He observed:-

“..... If unaided walking ability is the test, it inevitably means that no blind person can walk, which is absurd”

8. It follows from the above in my judgment that the question of ability to walk which is to be evaluated under the relevant statutory provisions is to be approached on the basis of the ordinary meaning of “to walk” with its ordinary connotations of forward movement by the legs, weight bearing and balance upright. The walking ability need not however be unassisted.”

18. In my judgment Ms. Wilcox’ second submission (summarised in paragraph 8 above) is correct. A person who can only make progress on foot with crutches and who, although placing both feet on the ground alternately, does not and cannot place any weight on one of his legs, is not “walking” and so is “unable to walk.” I reach that conclusion for the following reasons.
19. First, in my judgment the reasoning underlying the decision in R(M) 1/89 applies just as much to such a person as to the one who (for whatever reason) can only ever place one foot on the ground. The dictionary definitions relied upon in that and earlier decisions refer to at least one foot being always on the ground. But those definitions are with reference to the walking motion of a person without disability, and the emphasis on one of the feet being always on the ground is primarily to distinguish the case of walking from that of running, where for a time neither foot is on the ground. I accept the submission by Ms Wilcox, in her excellent and able written argument, that for present purposes the more significant reference is that in the Shorter Oxford English Dictionary’s definition to “progress by alternate movements of the legs.” Implicit in that, and I think (although less clearly so) in the other definitions, is the requirement that both legs are used to assist the walking motion. That is not so in the case of a person one of whose legs is not weight bearing. It is for that reason that a person who can only “swing through” cannot “walk”, and not simply because one of his feet is never placed on the ground.
20. Secondly, a person whose foot rests on the ground, without any weight being placed upon that leg, may well be doing that, rather than “swinging through”, merely because that is easier for him than keeping the bad leg raised would be. It is difficult to see why a person who can only progress by allowing his bad leg to rest on the ground during part of the forward motion, but who can place no weight on it in order to assist that motion, should be less entitled to benefit than someone who (for whatever reason) cannot place one foot on the ground at all.

21. Thirdly, I do not accept the submission, made by Mr. Heath at one stage, that a leg must necessarily be bearing some weight if that foot is placed on the ground. The question is whether the bad leg performs any useful function in assisting the forward motion. If it does not because it can bear no weight, the claimant is not "walking".
22. Fourthly, I accept Mr. Heath's point that to the onlooker a person whose foot is placed on the ground, but with no weight on it, may appear to be walking just as much as a person who does place weight on that leg. It may be impossible for an onlooker to tell whether weight is being placed on it or not. However, the task for the decision maker or tribunal will be to determine whether weight is (or could be) placed or not. That may not be an easy task, and there may be difficult borderline cases. However, that seems to me to give rise to no greater likelihood of factual difficulty than would be the case if the law were that a person who "swings through" does not walk but that a person who places both feet on the ground alternately (whether or not the bad leg is weight bearing) does. If that were the law very difficult decisions would be likely to arise in the case, for example, of a person part of whose foot on the bad leg touches the ground for a short time, or whose foot sometimes does and sometimes does not touch the ground.
23. It follows that in my judgment the Tribunal's decision in this case was erroneous in law, because it made no findings as to whether the Claimant's left leg was or could be weight bearing. My decision on this appeal is set out in paragraph 1 above. The new tribunal, in determining whether the Claimant is either unable or virtually unable to walk, must ignore any ability to make progress with crutches which can only be achieved without placing any weight on the left leg. In answering that question the Tribunal must of course consider not simply the weight which the Claimant does in fact place, but that which he could place, on that leg. In considering virtual inability to walk any weight bearing ability the exercise of which would give rise to severe discomfort must also be ignored.
24. I was informed at the hearing that the Claimant has now been awarded the higher rate of the mobility component on a subsequent claim. This cannot affect the new tribunal's decision, which must be made on the evidence before it, and must not take into account any deterioration in the Claimant's condition after 3 September 1999, the date of the decision appealed against.

(Signed)

Charles Turnbull
(Commissioner)

(Date)

10 August 2001