

1989-4

RAS/17/LW

Commissioner's File: CM/098/1989

Region: London North

SOCIAL SECURITY ACTS 1975 TO 1986
CLAIM FOR MOBILITY ALLOWANCE
DECISION OF THE SOCIAL SECURITY COMMISSIONER

Name: -

Appeal Tribunal: London

Case No: :

[ORAL HEARING]

1. My decision is that the decision of the medical appeal tribunal dated 24 October 1988 is erroneous in law. The case must be reconsidered by a differently constituted tribunal.
2. The claimant, now 18 years old, was brain damaged at birth and is mentally handicapped. In April 1986 a claim for a mobility allowance was made on his behalf. Eventually a medical board decided that the claimant satisfied the medical conditions for an award. However, the Secretary of State as he is entitled to do referred the Board's decision to a medical appeal tribunal and they disagreed with the Board. On appeal to the Commissioner the tribunal's decision was set aside as being erroneous in law. The case then went to the tribunal whose decision is the subject of this appeal. The claimant's request for an oral hearing of his appeal was granted. At the hearing he was represented by Ms B. Graham of the Disability Alliance. The Secretary of State was represented by Mr D. Ross of Counsel.
3. What has all along been in issue is whether the claimant's undoubted behavioural problems in so far as they affect his ability to walk derive from his physical disability (i.e. the brain damage) and, if so, whether they affect his walking ability to such an extent as to entitle him to an award of mobility allowance.
4. In their decision the tribunal referred at some length to the written evidence before them and to the evidence given by the claimant's mother at the hearing. They also described what they observed of the claimant's behaviour, and of his walking ability both indoors and out. In R(M) 3/86, in the case of a child who suffered from brain damage at birth which led to severe mental subnormality, a Tribunal of Commissioners made clear that it is only when behavioural problems which affect walking ability derive from physical disability that they can be taken into account in determining whether a claimant is virtually unable to walk. So when the problem is, as here, that the claimant's walking ability is affected by refusals to walk the adjudicating authority must be satisfied, if they are to make an award, that the refusals do not derive from conscious choice but from the physical disability. Plainly the tribunal in this case was aware of this. They referred to R(M) 3/86 and they concluded that the refusals to walk were a matter of choice. They said, in the material passage in their decision -

"The written evidence and the evidence of [the claimant's mother] given today does not in our view establish that Gonzalo's failures to walk are or have been or will be because he cannot do so (temporary paralysis) as envisaged in [R(M) 3/86]. Such evidence suggests to us (and we so find) that Gonzalo chooses not to walk from time to

time. Our observations of him today including the above mentioned walking out of doors confirm that view. In short the medical members relying on their expertise are of the opinion that all and any refusals to walk have been and will be because G chooses not to walk from time to time and are certainly not due to any temporary paralysis which may render him unable to walk. With regard to the need for an escort the same is only required for guidance purposes."

So the tribunal had in mind the correct test but what troubles me is that they do not explain why they reached the conclusion that the refusals to walk did not derive from the brain damage. It is not for me to express opinions about medical matters but at least I think it can be said that, in the case of a person who was so brain damaged at birth that he could not begin to lead a normal life and has a history since birth of behavioural problems of various sorts, the adjudicating authority should provide very clear reasons for attributing the behavioural problems in question to something other than the brain damage. If, in such a case as the present, the relevant behavioural problems have nothing to do with the physical damage what do they derive from? In the case of this 18 year old are the tribunal suggesting that his behaviour was that of a naughty child who just would not walk when required? And, if they were, is not the fact that a brain damaged 18 year old behaves as a child something to do with the brain damage? These are not all questions for me but they do in my view go to the question whether the tribunal, in the particular circumstances of this case, sufficiently explain, or indeed explain at all, how or why they reached the conclusion that the refusals to walk - and it was not in issue that the claimant did refuse - were nothing to do with his brain damage. In my view the tribunal's reasons in this case are insufficient to show to the claimant and his parents why the claim failed, and that renders the decision erroneous in law: R(A) 1/72. I accordingly allow this appeal.

5. This is the second time this case has come to the Commissioner. I would hope that it can come before another, entirely differently constituted, medical appeal tribunal as a matter of urgency.

(Signed) R A Sanders
Commissioner

Date: 6 October 1989