

MJG/BP

25/1983

SOCIAL SECURITY ACTS 1975 TO 1982

APPEAL FROM DECISION OF MEDICAL APPEAL TRIBUNAL ON A QUESTION OF LAW

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. I allow the claimant's appeal against the decision of the medical appeal tribunal dated 7 April 1983 and I set that decision aside as erroneous in law. I remit the case for re-hearing and re-determination, in accordance with the directions in this decision, to a differently constituted medical appeal tribunal: Social Security Act 1975, section 112 and the Social Security (Adjudication) Regulations 1984 [S.I. 1984 No. 451], regulations 34(4) and 39.

2. This is an appeal to the Commissioner on behalf of the claimant, a young man born on 31 December 1965 and thus now aged 18. Unfortunately the claimant was at birth afflicted with cerebral palsy and as a result he suffers from epileptic seizures which vary between 3 and 7 per day despite medication (for details see the report dated 5 August 1982 from Dr W.J.K.C. a consultant neurologist). He is also mentally handicapped to a considerable degree.

3. On 7 April 1983 the medical appeal tribunal confirmed the decision of a medical board (on 4 May 1982) that the claimant did not fulfil the medical requirements for an award of mobility allowance, giving as their reasons for decision,

"We have considered all the scheduled evidence. We heard the submissions of Mr M, on behalf of the claimant, who drew our attention to the additional evidence and particularly to the report from Dr W.J.K.C. dated 5 August 1982. Mr M. also referred to the additional evidence submitted to the tribunal this morning, comprising a letter from [the claimant's mother] and [from a college at which he was receiving education]. We also gave careful consideration to the decisions of the Tribunal of Commissioners [in reported decision R(M)1/83]. [The claimant's father] described to us a journey he made to the doctor's (about half-a-mile) on foot with [the claimant], about January 1982, in the course of which [the claimant] suffered three epileptic attacks. [The claimant's mother] described the difficulties experienced by [the claimant] in walking, namely, his unsteady gait, his lack of balance making him constantly liable to fall over and his tendency to trip over things.

His lack of concentration often prevented him from arriving at his intended destination. Since she obtained the wheelchair in March 1982, [the claimant] has only gone out of the house in the wheelchair. We note from [the principal of the college's] letter that he travels to and from college by taxi but he is able to walk about college without aid. He is able to climb stairs but tends to rush at them.

Our physical examination substantially confirms the clinical findings of Dr C. except that on observing him today, both with and without shoes, his gait is only minimally exaggerated, there is no evidence of imbalance or Rombergism. In our opinion [the claimant's] major disability is the incidence of epileptic attacks, which are of the two kinds as stated by Dr C. These are frequently conditioned by flashing lights. These attacks intermittently affect [the claimant's] ability to walk. Despite his mental retardation, he is able to converse and answer questions rationally. Although it is expedient that he should be under supervision when walking out of doors and we sympathise with the problems experienced by his parents, in our opinion the claimant is not unable to walk and, taking into account all the evidence before us, we are not of the opinion that he is virtually unable to walk, and we do not consider that he fulfils the requirements of Regulation 3(1)(b) nor, in our opinion, would the exertion required to walk constitute a danger to his life or would be likely to lead to a serious deterioration in his health".

4. Both the claimant's representative and the representative of the Secretary of State are agreed in one respect as to those reasons for decision, namely that there are not findings of fact on all relevant matters, as required by paragraph 15 of the reported Decision of the Tribunal of Commissioners in R(M)1/83. I accept in this respect the written submission of the Secretary of State (dated 10 February 1984, paragraph 2) as follows,

"It is submitted that although there are findings relating to the distance and the manner in which the claimant can make progress there is no finding as to either the speed or time in which he so progresses. Consequently, the Secretary of State agrees that the requirements of regulation 23(1) of the Social Security (Determination of Claims and Questions) Regulations 1975 has [sic] not been complied with and that there is an error of law. In the circumstances, despite the conclusion of the tribunal that [the claimant] is not virtually unable to walk they have not given their reasons therefore in full with regard to the provisions of regulation 3(1)(b) of the Mobility Regulations 1975".

I accept those submissions (which echo those made by the claimant's representative) and I conclude that the tribunal's decision was erroneous in law for want of adequate reasons covering all issues before the tribunal, though it is clear that the tribunal in this case took very considerable care both in dealing with the case and in the formulation of their reasons. Nevertheless, I am obliged to set their

decision aside as erroneous in law and, in accordance with the normal practice, I remit the case, for re-hearing and re-determination, to a differently constituted tribunal.

5. The new tribunal that re-hears this case will of course be empowered to deal with all the medical and factual issues afresh and many of the arguments which have been addressed to the Commissioner should be addressed to that new tribunal. However, there is one important legal point which arises. Detailed guidance for medical appeal tribunals in cases involving mobility allowance was given by a Tribunal of Commissioners in reported Decision R(M)1/83. After that Decision was given, the Court of Appeal gave on 9 February 1984 its Decision in a case involving mobility allowance, Lees v Secretary of State for Health and Social Security (unreported). A copy of the full transcript of that decision has been supplied to the parties and to the Commissioner. The new medical appeal tribunal that hears this case should also be supplied with the transcript and will of course have reported Decision R(M)1/83 available to it. In a Direction dated 6 April 1984 I requested submissions from the parties on the application to the present appeal of the Court of Appeal's Decision in the Lees case. My direction did not refer to the reported decision of the Tribunal of Commissioners in R(M)1/83 but a further written submission on behalf of the Secretary of State, dated 30 April 1984, states,

"In Decision R(M)1/83 a Tribunal of Commissioners held that 'the reference in regulation 3(1)(b) to the making of progress on foot means that it is proper to take account of the fact that a major purpose of walking is to get to a designated place', and that 'if a person can be caused to move himself to a designated place only with the benefit of guidance and supervision and possibly after much cajoling the point may be reached at which he may be found to be virtually unable to walk' (paragraph 25). Earlier in their decision the Tribunal of Commissioners had concluded that 'the need for ... assistance (i.e. 'guidance, supervision or support') is a facet of the manner in which a person can make progress on foot and is to be taken into account by the medical authorities ...' (paragraph 22). It is to be noted that the Commissioners considered that the statement in Decision CM 1/82 that a 'claimant's inability to control the direction in which she went had nothing to do with her ability to walk and could not be taken in account' was putting the matter too widely (paragraph 24).

It is clear from the MAT reasons for decision that they took account of R(M)1/83 and specifically stated that [the claimant's] 'lack of concentration often prevented him from arriving at his destination'. From this it may be seen that the MAT have, as indicated in paragraph 25 of R(M)1/83, taken account of the fact that a major purpose of walking is to get to a designated place.

In Lees v Secretary of State for Social Services the Court of Appeal approved the statement of the Commissioner in Decision CM 1/83 cited above. Eveleigh L.J. said (page 6G): 'for the purpose of considering the present case I think that

the ability to walk as contemplated by the regulation is the ability physically to control the movement of the feet so as to move in an intended direction'. O'Connor J.L. said (at page 13A): 'A person is unable to walk if he cannot use his legs for walking ....', and (at page 13C): 'In deciding whether a person is unable to walk it is .... quite irrelevant to consider what use a person may or may not make of that physical capacity'. Later, at page 13D), O'Connor L.J. added that he could see no reason for giving 'unable to walk' any different meaning in the phrase 'virtually unable to walk'; and at page 13E-G he rejected a submission on behalf of the claimant that ability to walk out of doors for the purposes of regulation 3(1)(b) ought to be construed as an ability to reach a destination by walking out of doors: 'I can see no justification for importing any such sense into the words of paragraph (b), which quite clearly directs the [medical authorities] to consider physical aspects of walking'.

It is submitted that the judgments of the Court of Appeal are inconsistent with the statement of the Tribunal of Commissioners in paragraph 25 of Decision R(M)1/83 that 'it is proper to take account of the fact that a major purpose of walking is to get to a designated place', and it is suggested that this statement must be regarded as having, by implication, been overruled. It is unfortunate that, although Decision R(M)1/83 was considered at length by the Court in the course of argument, neither member of the Court referred expressly to the decision in his judgment. While it might be argued that the decision in Lees should be treated as being confined to the facts of that particular case (i.e. a blind person with a 'marked impairment of capacity for spatial orientation') it is evident that both judges, and in particular O'Connor L.J., were making statements in their judgments which they intended to be of general application. It is therefore submitted that the only question now relevant for regulation 3(1)(a) and (b) is whether a person can physically control the movement of the feet so as to move in an intended direction, and that, for the purposes of sub-paragraph (b), this question falls to be determined by reference to each of the four considerations (distance, speed, duration and manner) there specified.

Insofar as the MAT have treated the question of [the claimant's] ability to arrive at an intended destination as a facet of his ability to walk it is submitted that, following the Lees judgment, this is no longer a factor to be taken into account. It is however for consideration whether the frequency of epileptic fits, which on the basis of evidence referred to by the MAT can amount to 3 within  $\frac{1}{2}$  a mile, may itself lead to the conclusion that [the claimant's] 'scope or quality of walking is so poor that it virtually amounts to an inability to walk'. (See page 10 of the Lees transcript at E.)"

6. In response to that submission, the claimant's representative submits (written submission dated 24 May 1984) as follows,

"In his submission the Secretary of State implies that the Court of Appeal rejected the arguments in R(M)1/83 but this is not so. On page 6 at D, Eveleigh L.J. states that "When we are dealing with the meaning of a regulation we do not readily find assistance to the way in which a particular case should be decided by invoking words used to explain or interpret the regulations for the purpose of reaching a decision in some other case". Indeed earlier in his judgment Eveleigh [L.J.] does state that other cases had been cited and (page 4G ff) 'These cases have shown that there can be a great number of different factors which affect the usefulness of a person's legs to him. For example he may be observed to move his legs and feet in the manner which we all display when walking, but he may be unable to direct his feet in an intended direction. This disability may exist even though a person knows quite well the direction in which he wishes to proceed. There may be an inability to move the feet from one place to another as desired because of a tendency to walk erratically or in circles. There may be a temperamental inability to move from time to time'. These issues are the ones discussed in R(M)1/83 and are not overruled by the Court of Appeal decision. Paragraph 4 of the Secretary of State's submission is erroneous when it states this.

It is though conceded that an inability to reach a desired direction is not sufficient to tender a person virtually unable to walk. Erratic walking, walking in circles, tantrum fits are still relevant. Furthermore in [the claimant's] case there is the tendency to trip over and this has resulted in numerous accidents. It is of note that the Secretary of State mentions in paragraph 5 [the claimant's] epilepsy. While no causal link can be proven between [the claimant's] walking and the attacks his father gave evidence at the hearing before the MAT that they certainly came on more frequently when walking. It is known that flashing lights can provoke attacks and hence theatres forewarn audiences before performances if certain forms of lighting are to be used to avoid this eventuality. It is the parents' view from experience that traffic lights, car lights etc., do produce fits. There is the more fundamental aspect that even in calm conditions [the claimant] has so many attacks that it is almost inevitable that an attack will occur during the time taken for a short walk. ... In summary, [the claimant] has a multiplicity of medical disabilities which render him unable to walk. His mental disability (caused by physical problems at birth), his lack of balance, his propensity to fits and his lack of spatial orientation, all must be considered as whole when assessing whether he is or is not unable to walk. The decision in the case of Lees would have to be followed if the only argument was as to spatial orientation. It is submitted that [the claimant] should be awarded Mobility Allowance".

7. I have given very careful consideration to those detailed submissions and to the transcript of the Court of Appeal's Decision in the Lees case. The Decision of a Tribunal of Commissioners in R(M)1/83 is intended to provide some measure of authoritative guidance and certainty in an area where by definition (Social Security Act 1975, section 116) there is "a question of law of special difficulty". I have come to the conclusion that, as neither of the judgments in the Court of Appeal make reference to R(M)1/83, which Decision was apparently canvassed in argument before them, these judgments cannot have been intended expressly or impliedly to over-rule statements made by the Tribunal in R(M)1/83. If they had been so intended, then I consider that the Court of Appeal would have said so in terms. Consequently, I reject the submission of the Secretary of State to the contrary. In my judgment in dealing with cases of this type the medical appeal tribunal must consider both R(M)1/83 and Lees v Secretary of State for Social Services but should bear in mind that the Lees' case concerned very different facts (a blind person with spatial disorientation). Decision R(M)1/83, however, was concerned with a claim on behalf of a child who was hyperactive with no sense of direction or danger and unable to move about freely and easily owing to his mental retardation, a case bearing some resemblance to the present one. In many ways, every case depends on its own facts, Rulings on questions of fact (many of the dicta of the Court of Appeal in the Lees' case in my view coming in that category) are not to be taken as universally applicable to different factual situations. Only statements of legal principle are binding.

8. In my view the medical appeal tribunal in this case must take into account all the complex factors in deciding whether or not the claimant is virtually unable to walk. They will no doubt wish to give serious consideration to the submission made on behalf of the Secretary of State that "it is however for consideration whether the frequency of epileptic fits, which on the basis of evidence referred to by the MAT can amount to 3 within  $\frac{1}{2}$  a mile, may itself lead to the conclusion that [the claimant's] 'scope or quality of walking is so poor that it virtually amounts to an inability to walk' (see page 10 of the Lees' transcript at E)". I should also mention that I understand that currently application is being made to the House of Lords for leave to appeal against the Court of Appeal's Decision in the Lees' case and the new medical appeal tribunal may wish to enquire about this matter at the time of their hearing. However, I do not consider that this is any reason for my postponing my Decision in this case, nor necessarily for the new medical appeal tribunal to do so.

(Signed) M J Goodman  
Commissioner

Date: 20 July 1984

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