

Mesome (ME) - ME suffers needs to class  
see after claimant has not  34/96

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Commissioner's File: CM/158/1994 DLA REECE

SOCIAL SECURITY ACTS 1975 TO 1990

SOCIAL SECURITY ADMINISTRATION ACT 1992

CLAIM FOR MOBILITY ALLOWANCE

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. For the reasons set out below, the decision of the disability appeal tribunal (DAT) given on 9 June 1994 is not erroneous in point of law, and accordingly this appeal fails.

2. This is an appeal by the claimant, brought with the leave of a Commissioner, against the decision of the DAT of 9 June 1994.

3. The question for determination by the tribunal was whether the claimant satisfied the conditions for an award of mobility allowance. In the event, the tribunal, upholding the decision of the adjudication officer, decided that he did not. They went even further and dealt with the question of actual entitlement. However, entitlement did not fall within their jurisdiction; they were only concerned with whether or not the claimant satisfied the medical conditions for an award of the allowance. However, absolutely nothing turns on the point, in that the tribunal did decide the matter which they were required to decide, and their consideration of the entitlement issue was simply void and of no effect.

4. The tribunal made the following findings of fact:-

- " 1. The tribunal accepts the diagnosis that [the claimant] is suffering from ME.
- 2. The tribunal also accepts that any physical exertion leaves [the claimant] exhausted.
- 3. If he does get exhausted, he is able to rest and after he has rested - which may take 2 or 3 days - he is able to establish more of an equilibrium.

4. Although there was evidence that walking caused some pain, there was no evidence of severe discomfort."

The tribunal gave the following reasons for their decision:-

"..... it is clear, and was not argued, that [the claimant] was not wholly unable to walk; therefore this ground was not available to him.

In relation to the second ground set out in regulation 3 of the Mobility Allowance Regulations 1975, and in the light of the findings of fact, there was evidence that [the claimant] would walk more slowly than the average person and there was also evidence that if he did walk he would get some pain. There was also evidence that having completed a walk he was still very tired. However the tribunal came to the conclusion that this ability to walk was not so limited as regards the distance over which or the speed at which or the manner in which he can make progress on foot without severe discomfort that he was virtually unable to walk. Therefore the tribunal concluded that he did not satisfy the tests set out in regulation 3(1)(a)(ii).

In relation to the third condition that 'exertion required to walk would .... be likely to lead to a serious deterioration in his health'. The tribunal kept to the argument of Mr Hollingshead that, although exertion did leave [the claimant] very exhausted it did not result in serious deterioration in his health since, having rested, he would improve. The tribunal noted the argument that there was a risk when he was tired that he might forget his insulin. There was, however, no evidence that there had been any occasion on which there had been any major problem in relation to his insulin. Although it was, of course, always important for those suffering from diabetes to keep a close eye on their blood sugar, and although there was evidence that [the claimant's] blood sugar level could vary rapidly, the tribunal could not conclude that exhaustion from the exertion required to walk would, in the light of the facts found, lead to a serious deterioration in his health. Before leaving this appeal, the tribunal did consider whether in the light of the introduction of Disability Living Allowance there were grounds for considering whether [the claimant] might be entitled to the lower rate of mobility component for DLA. No specific submissions had been made in relation to this on his behalf but the tribunal felt that it should consider the matter, for the sake of completeness. [The claimant] had provided evidence that if he went out there were one or two occasions on which he appeared to have become disorientated. However, there was no evidence that the only basis on which he could go out of doors, ignoring routes which were familiar to him was either with guidance or supervision from another person most of the time. In the light of the lack of evidence, the tribunal again came

to the conclusion that there could be no entitlement within the statutory tests to the lower rate mobility component of a Disability Living Allowance.

For all these reasons, and while accepting that [the claimant] does experience severe problems of fatigue, the tribunal nevertheless concludes that the statutory tests for entitlement to Mobility Allowance or the mobility component of Disability Living Allowance are not satisfied in this case and, as a consequence, the tribunal has no alternative but to disallow the appeal."

I see nothing wrong in law with the tribunal's decision. They have gone into the matter in considerable depth, and have given full and adequate reasons for their decision.

5. However, the adjudication officer now concerned, somewhat surprisingly, supports the appeal. He first contends:-

"That the tribunal have erred in law in that they have not made independent findings of fact on all the questions set out in reg 3(1)(ii) of the Mob A Regs [now regulation 12(1)(ii) of the DLA Regs] - which are distance, speed, length of time and manner of the claimant's actual ability to walk."

I see nothing in this submission. The tribunal clearly made a finding on each of the components of the regulation. The only criticism that could be made is that they omitted to refer to the "length of time" but I think that was a mere slip. For in the final sentence of their reasons they specifically state:-

"The tribunal nevertheless concludes that the statutory tests for entitlement to Mobility Allowance are not satisfied in this case."

There was no suggestion in this case that the claimant could not satisfy the factors in question. The claimant's case was simply that he suffered from ME and that walking made him tired. But that tiredness did not amount, in the tribunal's view, to severe discomfort. That was a matter for their determination. They had to apply a value judgment, and I cannot interfere with their conclusion.

6. The adjudication officer now concerned goes on to support the appeal on a further ground. He says as follows:-

" 11. In their findings of fact, the tribunal find:-

'.... if [the claimant] does get exhausted, he is able to rest and after he has rested - which may take 2 or 3 days - he is able to establish more of an equilibrium'

It is my submission that the tribunal were required to make findings of fact on the claimant's ability to walk during

the period of recovery from exhaustion, which could account for almost 50% of the week if the claimant only went out walking once each week."

I see no force in that submission either. The fact that a person is resting does not mean that he cannot walk or that he is virtually unable to walk. There was no suggestion that during the rest period he was unable or virtually unable to walk. The resting was directed to the restoration of the claimant's condition generally, i.e. from all the exertion which he had previously undertaken. A sense of proportion has to be adopted in cases of this sort. Walking a short distance, eg. 100 yards is not a very onerous undertaking, and the fact that a person suffering from ME is resting to recover from his previous exertions does not imply that he is unable to walk or virtually unable to walk during such a period of rest.

7. The adjudication officer now concerned also contended that the tribunal erred in point of law in their determination that the exertion required to walk would not result in a serious deterioration in the claimant's health. In my judgment, 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 eg. 12 months, or
- (c) there was a worsening from which recovery could only be effected by some form of medical intervention.

A person does not suffer a deterioration (serious or otherwise) in his health if, without medical intervention, his condition can be restored by a few days of rest. Accordingly I see nothing wrong with the tribunal's finding 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."

8. In my judgment, the tribunal applied a commonsense approach to the claimant's condition. They accepted that when he exerted himself he became exhausted or very tired - clearly the tribunal made no distinction between these terms - but that did not render him unable or virtually unable to walk within the statutory definition, nor did it result in a serious deterioration in his health. They had to make a value judgment, and I do not see how they could usefully have said more than they did. They have dealt with the matter with a commendable thoroughness.

9. Accordingly, I have no hesitation in dismissing this appeal.

(Signed) D.G. Rice  
Commissioner  
(Date) 01 APR 1996