

7. a state of the art DAA decision from
Comm. Man para 4 onwards.

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DJM/GM

Commissioner's File: CSM/34/93

SOCIAL SECURITY ADMINISTRATION ACT 1992

APPEAL TO THE COMMISSIONER FROM A DECISION OF A DISABILITY APPEAL TRIBUNAL
UPON A QUESTION OF LAW

DECISION OF SOCIAL SECURITY COMMISSIONER

Name:

Disability Appeal Tribunal: Glasgow

Case No: D/51/131/92/0169

1. My decision is that the decision of the disability appeal tribunal dated 27 January 1993 is erroneous upon a point of law. I set it aside. I remit the case to a new disability appeal tribunal for a rehearing.

2. The sequence of events in this case was set out by the Secretary of State in his observations on a reference on an appeal by the claimant in relation to the decision of a medical board at Glasgow on 1 July 1991 that she did not satisfy the medical condition for mobility allowance. These observations are as follows:-

"1. Mobility Allowance was awarded from 4.6.90 to 3.6.91. On 6.3.91 a renewal claim was received.

2. On 15.4.91 [the claimant] was examined by a medical practitioner whose report is attached. In the light of this report the adjudication officer decided that she is not unable to walk or virtually unable to do so because of physical disablement.

3. On 8.5.91 an appeal to a medical board against the adjudication officer's decision was received.

4. On 1.7.91 [the claimant] was examined by a medical board. Their report is attached. The board decided that she is not unable to walk or virtually unable to do so because of physical disablement.

5. On 17.9.91 an appeal to the medical appeal tribunal was received."

3. The claimant's appeal was heard by a disability appeal tribunal on 27 January 1993. The decision of the tribunal was as follows:-

"The claimant is not entitled to Mobility Allowance from 04 06 91."

The findings in fact made by the tribunal were as follows:-

"1. Prior award of Mobility Allowance 04 06 90 to 03 06 91.

2. Date of renewal of claim 06 03 91.

3. Claimant suffers severe abdominal pain (cause unknown). She has recurring wound abcess [sic] following bowel surgery in 1990. She has stable angina which is not causing undue breathlessness, and a degree

of osteoarthritis in lumbosacral spine. She has poor hearing and is subject to depression.

4. She does not go out unaccompanied.

5. On 15 04 91 and 01 07 91 she walked 100 yards without undue distress."

The reasons given by the tribunal for their decision were as follows:-

"The tribunal considered in particular Regulation 3(1)(a)(ii) of Mobility Allowance Regulations having regard to facts found at box 2 above. They did not find it established that the claimant's physical condition was such as to render her virtually unable to walk. They agreed that the evidence indicated that she could walk in excess of 100 yards, albeit slowly, without significant pain or breathlessness. They noted that the claimant's abdominal condition was under regular review by surgical specialist at Glasgow Royal Infirmary but that no further surgery is planned.

It was felt that the claimant's depression was significantly affecting her ability to get out and about and that that, together with the other conditions detailed at (3) in box 2 above, necessitated supervision out of doors. For this reason the Tribunal is referring the case to the Adjudication Officer to consider entitlement to Disability Living Allowance lower rate mobility component from 06 04 92."

4. The claimant has appealed against the decision of the disability appeal tribunal to the Commissioner. The appeal is not supported by the Secretary of State. The tribunal expressed their decision in a manner which erred in law. The question they had to decide was not whether the claimant was entitled to mobility allowance but whether she satisfied the conditions for mobility allowance. That question is a medical question and not a question of entitlement. In expressing their decision as one relating to entitlement the tribunal have erred in law and their decision must be set aside. I am also satisfied that the tribunal failed to state facts and reasons for their decision adequately. Thus on these grounds also they have erred in law in respect that their decision does not conform to the requirements of the Social Security (Adjudication) Regulations 1986 26E - (5), and their decision falls to be set aside.

5. The position in respect of the requirement of a disability tribunal to state facts and reasons for their decision is as follows:-

"4. The Social Security (Adjudication) Regulations 1986 provide:-

"26E. - (5) The chairman of a disability appeal tribunal shall in each case -

- (a) record the decision of the tribunal in writing; and
- (b) shall include in such record a statement of the reasons for decision, including findings on all questions of fact material to the decision, and ..."

The Commissioner in a case with reference number CM/406/92 said in paragraph 10 in respect of the requirement to give reasons:-

"In R(SB)6/81 and R(SB)11/82 the general test of adequacy of reasons given by social security appeal tribunals as set out, those decisions adopted the guidance as to adequacy of reasons given by the Commissioner in R(A)1/72 namely ... the minimum requirement must at least be that the claimant looking at the decision should be able to discern on the face of it reasons why the evidence failed to satisfy the authority. This test has been adopted in respect of other statutory authorities and in my judgment it is equally applicable when considering regulation 26E(5). ... The reasons may be brief. However where the medical evidence submitted on behalf of the claimant has been rejected it is necessary for the tribunal to give some reason for its rejection. In my judgment that requirement is as important in order to enable a claimant to understand why it is that the decision has gone against him."

The Commissioner earlier in his decision said in paragraph 9:-

"9. A disability appeal tribunal is not a specialist tribunal in the sense a medical appeal tribunal is, and the members do not have the expertise which the members of a medical appeal tribunal bring to the cases before them With regard to what disability appeal tribunals have to do, I feel I can do no better than quote the words of Lord Reid in Jones v The Secretary of State [1972] 1 All ER 150:-

"... statutory tribunals have to consider and determine just as difficult medical questions as those which the respondent maintains are reserved for medical tribunals in disablement cases. They do it as Courts of Law do it: they receive medical evidence and reports and adjudicate on them."

The disability appeal tribunal has to decide the case on the material presented to the members and they therefore have to decide on the balance of probabilities which of the conflicting medical opinions is correct."

I agree with and adopt what the Commissioner said in that case.

It was further said by Neil L J in an opinion given in the decision of the Court of Appeal in the case of Kitchen and Others v the Secretary of State for Social Services which was issued on 30 July 1993, in the context of requirement imposed upon medical appeal tribunals by regulation 31(4) of the Social Security (Adjudication) Regulations 1986.

"(4) A decision on a question of causation may pose particular difficulties when one is examining the adequacy of the reasons for the decision. In some cases it may be sufficient for the tribunal to record that it is not satisfied that the present condition was caused by the relevant trauma. Where, however, a claimant has previously been in receipt of some benefit or allowance, (particularly if the benefit or allowance has been paid over a long period) and there is no question of malingering or bad faith it seems to me that the tribunal should go further than merely state a conclusion. If one accepts that the underlying principle is unfairness the claimant should be given some

explanation, which may be very short, to enable him or his advisers to know where the break in the chain of causation has been found."

While I appreciate that the functions and approaches to their respective function of a medical appeal tribunal and a disability appeal tribunal are radically different the underlying principle of fairness, referred to by Neil L J, is applicable in my view and the process of making decisions that a disability appeal tribunal has to carry out and this would involve their giving the sort of explanation which Neil L J said was required to be given by medical appeal tribunals, in similar cases before them.

6. The Social Security Act 1975 section 37A(1) provides as follows:-

"37A. - (1) Subject to the provisions of this section, a person who satisfies prescribed conditions as to residence or presence in Great Britain shall be entitled to a mobility allowance for any period throughout which he is suffering from physical disablement such that he is either unable to walk or virtually unable to do so."

The Social Security (Mobility Allowance) Regulations 1975 prescribe as follows:-

"3(1) A person shall only be treated, for the purposes of section 37A as suffering from physical disablement such that he is either unable to walk or virtually unable to do so, if -

(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 the 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; ..."

The issue in this case is whether the conditions set out in regulation 3(1)(a)(ii) have been satisfied. The other conditions specified in the regulations appear to have no applicability to the circumstances in this case. In this case the tribunal have made findings in respect of the claimant's physical disabilities. They have not however related them to any particular period in time. It will be noted that the report of the medical board was dated 1 July 1991 and the claimant's appeal was not heard by a disability appeal tribunal until 27 January 1993. In addition the tribunal have not related the physical disabilities found by them to the tests laid down in regulation 3(1)(a)(ii). It was said by the Commissioner in the case with reference number CM/216/1988 at paragraph 3:-

"Regulation 3(1)(b)" (now regulation 3(1)(a)(ii)) "clearly imports that a person may be found to be virtually incapable of walking if he is limited in one or more of the various ways mentioned in that regulation in making progress on foot without severe discomfort. Accordingly it was incumbent on the MAT to record findings in fact on each of the factual tests in regulation 3(1)(b)."

I agree with the Commissioner, in the context of the differences between the different functions of an MAT and a DAT in respect that the latter must make its findings on the evidence presented to it and not on the basis of its own expertise of examination. The tribunal have made no findings in respect of the tests laid down in the regulation.

The tribunal have further failed to make any findings in respect of her ability to walk as at the date of the hearing. It will be noted that the finding in relation to distance is in respect of dates in 1991 as set out in finding 5. There was evidence noted by the chairman in the note of evidence which derived from the claimant and which indicated a much more restricted ability to walk. The tribunal have not dealt with that evidence either in their findings or their reasons. The tribunal have also failed to make findings in relation to the ability of the claimant to walk out of doors in the context of that regulation. I would refer to what was said by the Commissioner at paragraph 4 in the case with the reference CM/103/1984. He said:-

"The criterion in regulation 3(1)(b) is as to the ability of a claimant to walk out of doors; the tribunal has made no finding specifically with regard to the capacity of the claimant in this case to walk out of doors notwithstanding that it was the statutory criterion and it was as to that that the evidence was before it. This is an error of law and alone would require me to allow the appeal."

The tribunal have in their reasons said "it was felt that the claimant's depression was significantly affecting her ability to get out and about and that together with other conditions detailed at (3) in box 2 above, necessitated supervision out of doors.". However there are no findings in fact in relation to this matter. The conclusion reached however in the reasons why undoubtedly material to the question that the tribunal required to address. However the factual basis for the conclusion is not the subject of adequate findings and is not sufficiently precise to enable the reader of the decision to know what the basis in fact for the conclusion was. It is further not tied in with the tests laid down in regulation 3(1)(a)(ii).

7. The tribunal have in addition failed to state reasons for their decision adequately. The tribunal do not make it clear as to why it is they came to the conclusion that the claimant failed to satisfy the conditions specified in regulation 3(1)(a)(ii). What they have done is state a conclusion that they did not find it established that the claimant's physical condition was such as to render her virtually unable to walk. They say "they agreed that the evidence indicated that she could walk in excess of 100 yards, albeit slowly, without significant pain or breathlessness.". They noted that the claimant's abdominal condition was under regular review by a surgical specialist at Glasgow Royal Infirmary. However their reasons do not tell the claimant why it is that having satisfied the conditions for the allowance previously she no longer does so. The test of fairness which I have already referred to requires such an explanation. In stating their conclusion in

respect of the claimant's walking ability they are relying upon a finding of her ability to walk at dates in excess of a year from the date of the tribunal hearing. There was evidence before them in relation to much more restricted capacity for walking. However the tribunal do not set out why it was the claimant's evidence was not accepted in this regard.

8. In his submission to the Commissioner the Secretary of State submitted:-

"12. The claimant's representative in his grounds of appeal to the Commissioner contends that the claimant mentioned good and bad days as recorded in the Chairman's notes of evidence and that the tribunal should have made findings to show that they had considered this variation in her condition.

13. It is submitted that the Commissioner in CM/361/92 held at paragraph 4:-

"... Moreover they must assume, unless there is something to indicate to the contrary, that the medical authorities have taken into account all relevant medical considerations, and have given due weight to all the contentions of the claimant as to his or her medical condition..."

Also at paragraph 4:-

"... They will, of course, be concerned with such matters as whether or not the claimant had a fair opportunity of presenting his or her case to the relevant medical authorities or whether the latter properly construed the relevant regulations, matters which are clearly legal issues; but they will not be concerned with any medical judgement as to the claimant's physical abilities..."

14. It is therefore considered that this contention of variation in her condition would have been considered by the doctors who carried out the medical examinations on 15.4.91 and 1.7.91 and in weighing the evidence the tribunal have found that it 'agreed that the evidence indicated that she could walk in excess of 100 yards, albeit slowly, without significant pain or breathlessness'."

I am not able to square what the Commissioner is quoted as saying in that case with (a) the exercise the tribunal had to carry out, which was to answer a disability question which involved assessment of evidence on medical matters, and (b) what was said in paragraph 9 of CM/406/92 which I have quoted above. It is clear that the tribunal will not be making medical judgments on their own expertise and examination. They are not allowed to do. They will however be weighing up medical matters and making findings in fact upon them. The role of members of the tribunal and in particular the medical member is succinctly set out in paragraph 9 of CM/406/92. I commend the observations of the Commissioner in that case for the purpose of ascertaining the functions of disability appeal tribunals. In these circumstances I do not consider that a tribunal is entitled to make any assumptions as to what the medical authorities have taken into account or not. They are also entitled to and indeed were, in my view, despite what is said to the contrary by the Commissioner in CM/361/1992, weigh further evidence from the claimant whether it could have been presented to the tribunal or not. In this case the

tribunal were required to answer the question in respect of whether the conditions for mobility allowance is satisfied up until 6 April 1992 which was the date of the change whereby disability living allowance was introduced. Thus the tribunal were entitled to and required to receive evidence post-dating the medical board and once received had to make findings in respect of it. It was necessary for the tribunal to adjudicate upon the question of whether the claimant satisfied the conditions for mobility allowance up to 6 April 1992.

9. The approach the new tribunal should take in determining the case ought to be evident to them from the content of this decision. It seems to me however that given the number of different potential decisions that the tribunal could make in this case and given that the introduction of disability living allowance was at a date between the period from the date of the claim to the date on which the hearing will take place it would be helpful to the fresh tribunal if the Secretary of State made submissions as to the effect of the introduction of disability living allowance upon the claim and the manner in which it requires to be determined. I direct him to do so.

10. The appeal succeeds.

(signed) D J May
Commissioner
Date: 8 December 1993