Assessment of disablement for disablement benefit - reg 10(1)(b) of SDA regs is confined to SDA. Claimant appealed on to SDA beyond, contrary claim MAT must assess disablement for disablement benefit at at least 60%.

/25/SH/LM

Commissioner's File: CI/416/1988

Region: North Eastern

SOCIAL SECURITY ACTS 1975 TO 1986

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

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Name: Anthony Carroll

Medical Appeal Tribunal: Newcastle-upon-Tyne

Original Decision Case No: 224/5/88

[ORAL HEARING]

1. This is a claimant's appeal against a decision of the medical appeal tribunal ("MAT") dated 21 July 1988 which reduced to 15% from 19 April 1988 for life the assessment of the disablement occasioned to the claimant in consequence of the loss of faculty resulting from the industrial accident sustained by the claimant on 4 December 1985. My decision is as follows:

(1) The aforesaid decision of the MAT is erroneous in law in that it failed to deal either adequately or at all with a substantial point of law which had been canvassed by the claimant's representative. That decision is, accordingly, set aside.

(2) In fact, the aforesaid point of law falls to be determined against the claimant. The MAT which reconsiders this case will, therefore, so decide it. All other issues, however, will be at large before the fresh MAT. In my view, accordingly, that MAT should be constituted differently from the MAT which gave the decision the subject of this appeal.

2. I held an oral hearing of the appeal. The claimant attended and was most ably represented by Mr J A Featherstone of the Stockton-on-Tees Law Centre. The Secretary of State was equally ably represented by Mr D Ross of the Solicitor's Office of the Departments of Health and Social Security. Both advocates, indeed, presented their respective cases with genial lucidity.

3. The claimant was born in June 1955. On 4 December 1985, when he was employed as a semi-skilled plater, he fell whilst climbing into a tank the inside of which he intended to inspect. He injured his back and his left leg. It was undoubtedly an industrial accident - and on 18 January 1986 the claimant claimed disablement benefit.

4. On 22 October 1986 an initial adjudicating medical authority ("AMA") provisionally assessed disablement at 70% from 19 March 1986 to 18 April 1987. The disability described as fully relevant was "Impaired agility and locomotion". On 22 April 1987 a reassessment AMA renewed the provisional assessment of 70%, carrying its award down to 18 April 1988. On 4 March 1988 a further reassessment AMA again provisionally assessed disablement at 70% - and carried that award down to 18 April 1989. That last decision was referred by the Secretary of State to the MAT. On 21 July 1988 the MAT, before which appeared both the claimant and Mr Featherstone, made a final assessment of disablement at 15% from 19 April 1988 for life. And it is against that decision that this appeal is directed.

The central point of law in this appeal arises, in fact, out of legislation which was enacted in the context of the relatively new benefit of severe disablement allowance (which, by stages beginning in November 1984, replaced non-contributory invalidity pension and housewives' non-contributory invalidity pension). The relevant primary legislation is to be found in the substituted section 36 of the Social Security Act 1975. Incapacity for work is a fundamental condition. But - from the medical point of view - the crucial criterion is set out in subsection (5):

> "(5) A person is disabled for the purposes of this section if he suffers from loss of physical or mental faculty such that the assessed extent of the resulting disablement amounts to not less than 80 per cent."

6. But the stark simplicity of section 36(5) of the 1975 Act is substantially modified by regulation 10 of the Social Security (Severe Disablement Allowance) Regulations 1984 [SI 1984 No 1303]. That regulation is headed "Adjudication" and its first paragraph opens thus:

> "(1) For the purposes of section 36(5) (extent of disablement) of the Act [ie the Social Security Act 1975], the evidence required that on any day a person suffers or suffered from loss of physical or mental faculty such that the assessed extent of the resulting disablement amounts or amounted to not less than 80 per cent. shall consist of - ....."

There then follow no less than eleven sub-paragraphs (in the alternative) of which sub-paragraph (b) opens thus:

> "(b) evidence that on that day he is or was entitled to -
>
> (i) a mobility allowance under section 37A of the Act; or ....."

I quote the general comment at page 384 of "Non-Means Tested Benefits: The Legislation", Bonner, Hooker, Smith and White:

> "This regulation provides the grounds for claimants to be passported to SDA on the basis of some other benefit or certified condition."

7. The claimant in the appeal now before me was - at the date of the MAT's decision - in receipt of mobility allowance. The chairman's note of the oral proceedings before the MAT contains the following passage:

> "Mobility allowance given about 2 years for life." (I think that the word "ago" has been accidentally omitted after the word "years".)

Oddly enough, I cannot find in the papers any more precise information relating to the award of mobility allowance to the claimant; but at no place in the papers is that award denied and Mr Ross addressed me upon the basis that such an award had been made and was in effect at the date of the MAT decision.

8. So the principal argument on behalf of the claimant can be simply stated:

(a) The claimant is and was in receipt of mobility allowance.

(b) In the context of severe disablement allowance entitlement to mobility allowance suffices as evidence that the relevant person suffers from loss of physical or mental faculty such that the assessed extent of the resulting disablement amounts to not less than 80%.

(c) Albeit that in the case before me the MAT was assessing disablement in the context of disablement benefit, it was not open to that MAT to reach an assessment of less than 80%.

9. Mr Featherstone appreciated, of course, that the argument summarised as immediately above will - in appropriate cases - be subject to qualification. Section 57(1) (as amended) of the Social Security Act 1975 provides thus:

> "57. - (1) Subject to the provisions of this section, an employed earner shall be entitled to disablement benefit if he suffers as the result of the relevant accident from loss of physical or mental faculty such that the assessed extent of the resulting disablement amounts to not less than 14 per cent."

So there must be a causal link between the relevant industrial accident and the disablement which is the subject of assessment. In the case of mobility allowance, on the other hand, a claimant's inability or virtual inability to walk is assessed without reference to causation (save only that the relevant disablement must be physical). Mr Featherstone readily conceded that there will be cases where entitlement to mobility allowance can be quite clearly severed from the assessment of disablement for the purposes of disablement benefit. A man who has lost the use of his legs as the result of an accident in his own home will not, obviously, be entitled to invoke his award of mobility allowance in the context of an industrial accident to his nose. But - urged Mr Featherstone - that qualification has no bearing upon the present case. The physical condition of the claimant pursuant to which mobility allowance was awarded is wholly attributable to the relevant accident. The factual basis of that last point may well be true; but, since I have seen no documents whatever relating to the award of mobility allowance, I cannot take the factual issue further than that.

10. A more fundamental difficulty in Mr Featherstone's path is the obvious argument that regulation 10(1) of the Severe Disablement Allowance Regulations 1984 is directed solely to the adjudication of claims for severe disablement allowance and has nothing to do with the adjudication of claims for disablement benefit. Mr Featherstone was prepared to meet that argument head on. He cited section 57(1) of the 1975 Act, which I have myself quoted in paragraph 9 above. He cited section 36(5), quoted by me in paragraph 5 above. Save that section 57(1) makes reference to the result of the relevant accident and that the specified percentages are different, the wording is - stressed Mr Featherstone -identical: "..... if he suffers ... from loss of physical or mental faculty such that the assessed extent of the resulting disablement amounts to not less than .....". So the basic framework underlying assessment for the purposes of the two benefits is identical. That submission is fortified by section 108(1) (as amended) of the 1975 Act:

> "108. - (1) In relation to industrial injuries benefit and severe disablement allowance, the 'disablement questions' are the questions -
>
> (a) in relation to industrial injuries benefit whether the relevant accident has resulted in a loss of faculty;
>
> (b) in relation to both benefits at what degree the extent of disablement resulting from a loss of faculty is to be assessed, and what period is to be taken into account by the assessment;
>
> but questions relating to the aggregation of percentages of disablement resulting from different accidents are not disablement questions."

That subsection - urged Mr Featherstone - identifies and stresses the causation element

culiar to disablement benefit (cf paragraph 9 above); but it also indicates that - causation part - the criteria for assessing the extent of disablement are common to both disablement benefit and severe disablement allowance. The essential - and common -starting point is the loss of faculty. The concept of loss of faculty is picked up in regulation 10(1) of the Severe Disablement Allowance Regulations 1984 (see paragraph 6 above). Sub-paragraph (b) of regulation 10(1) provides specifically that entitlement to mobility allowance is by itself sufficient evidence that a claimant is suffering from such a loss of faculty that the assessed extent of the resulting disablement amounts to not less than 80%. True - conceded Mr Featherstone -regulation 10(1) opens: "For the purposes of section 36(5) (extent of disablement) of the Act .....". But on careful analysis - he submitted - those words are not as inimical to his main argument as they might at first appear. They do not run: "For the purposes of severe disablement allowance ....". The purpose of regulation 10(1) is expressed to be the assessment of the extent of disablement resulting from loss of physical or mental faculty. The reference to section 36(5) of the 1975 Act serves simply to set regulation 10(1) in its immediate context; it does not - and was not intended to - confine to severe disablement allowance the various criteria which are to be taken as establishing disablement to the extent of not less than 80%. The wording of regulation 10(1) is categorical. There is no formula to the effect of ".... the evidence required shall be deemed to be satisfied ....". The various matters set out in the eleven sub-paragraphs are expressly stated to be such evidence. And, by way of demonstrating what he submitted to be the intended interplay between assessment in the context of severe disablement allowance and assessment in the context of disablement benefit, Mr Featherstone referred me to sub-paragraph (c) of regulation 10(1):

> "(c) evidence that the extent of his disablement on that day has been assessed for the purposes of section 57 of the Act as not less than 80 per cent;"

11. Those contentions were succinctly - but vigorously - opposed by Mr Ross. His basic submission was that regulation 10 of the Severe Disablement Allowance Regulations has no application whatever to the assessment of disablement for the purposes of computing entitlement to disablement benefit. He drew attention to the very title of the Severe Disablement Allowance Regulations. Would it not be surprising, he asked rhetorically, to find in regulations of that name substantial and highly significant provisions governing the assessment of disablement in the context of disablement benefit? He conceded that an important provision may be found in a statute or regulation the title of which affords no clue to the inclusion of such a provision. For example, section 9 of the European Communities Act 1972 effects important amendments to the company law of this country. But, although a casual researcher into the company law of England might not think to dip into a statute entitled the European Communities Act, the fact is that section 9 makes plain beyond a paradventure the intention to amend and expand the Companies Act 1948. To put it another way, once section 9 of the European Communities Act 1972 has been located, its scope and effect are beyond question. It might have been somewhat bizarre drafting - submitted Mr Ross - to make provision for assessment in the context of disablement benefit in regulations entitled the Social Security (Severe Disablement Allowance) Regulations; but if that had manifestly been done, the AMA and the MAT would be bound to apply such provision. But it has not manifestly been done. On the contrary, the opening words of regulation 10(1) (cf paragraph 6 above) clearly demonstrate the legislature's intention to confine the provisions of regulation 10(1) to the adjudication of claims for severe disablement allowance. It is true that those words refer specifically to section 36(5) of the 1975 Act and not to severe disablement allowance in general terms. But it is important to note that section 36(5) itself opens -

> "(5) A person is disabled for the purposes of this section if ....."

And, of course, the section is entitled and is solely devoted to severe disablement allowance. It is section 50 of the 1975 Act which establishes the basic entitlement to disablement benefit. But - although there could readily have been - there is no reference to section 50 in

lation 10(1); and although section 57 is referred to in regulation 10(1)(c) (cf paragraph 10 ove), that reference applies assessments under section 57 to severe disablement llowance - it does not have the reciprocal effect.

12. I am satisfied that on this central point the submissions of Mr Ross are to be preferred. In the context of disablement benefit the extent of disablement has been being assessed ever since section 12 of the National Insurance (Industrial Injuries) Act 1946 came into effect. Mobility allowance has been on the scene since 1976. It is quite certain that until 1984 Parliament never saw fit to establish any direct link between an award of mobility allowance and an assessment in the context of disablement benefit. Obvious deficiencies in respect of non-contributory invalidity pension led to its replacement by severe disablement allowance. The introduction of severe disablement allowance was inevitably accompanied by regulations devoted thereto. In the absence of plain legislative language to the contrary, I am unable to accept that - by a sidewind of those regulations - substantial inroads have been made into the assessment of disablement in the context of disablement benefit. The social purpose underlying disablement benefit is clearly distinguishable from the social purpose underlying severe disablement allowance. There is no compelling reason whatever why the criteria for the assessment of the extent of ablement should be identical in respect of those two benefits. There is, of course, a substantial measure of overlap. Sections 36(8) and 57(3) of the 1975 Act both provide that "assessed" means assessed in accordance with Schedule 8 to that Act. But Schedule 8 makes no reference to entitlement to mobility allowance; and paragraph 2 thereof opens thus:

> "2. Provision may be made by regulations for further defining the principles on which the extent of disablement is to be assessed ...."

There is nothing either in the Act or in Schedule 8 to suggest that separate provision cannot lawfully be made by regulation in respect of, on the one hand, severe disablement allowance and, on the other hand, disablement benefit.

13. Under cover of a letter dated 22 April 1988 (ie before the MAT hearing) Mr Featherstone submitted, on behalf of the claimant, written representations which lucidly set out the substance of the oral submissions which, in due course, he made to me. The final paragraph of those representations read as follows:

> "As this is a question of law of special complexity I respectfully ask the Tribunal to refer the question to a Social Security Commissioner for his determination as provided for under S112(4) and (5) of the Act."

I accept Mr Featherstone's statement that at the hearing before the MAT he expressly referred to those written representations. Mr Featherstone recognises that section 112(4) confers upon a medical appeal tribunal a discretion as to whether it will or will not refer a question of law to a Commissioner before it gives its decision. But - he submits - his request for such a reference and the MAT's refusal to make such reference should have been dealt with, however briefly, in the relevant record of the MAT's proceedings. That was not done. For my part, I am not sure that that of itself amounted to vitiating error of law. But I do not have to decide that issue here. Much more significant was the MAT's total failure to refer to, let alone deal with, the significant argument based upon regulation 10(1) of the Severe Disablement Allowance Regulations. Regulation 31(4) of the Social Security (Adjudication) Regulations 1986 [SI 1986 No 2218] provides as follows:

> "(4) A medical appeal tribunal shall in each case record their decision in writing in such form as may from time to time be approved by the Secretary of State and shall include in such record, which shall be signed by all members of the tribunal, a statement of the reasons for their decision, including their findings on all questions of fact material to the decision."

m in no doubt that in failing to deal with the regulation 10(1)/mobility allowance gument the MAT fell into error of law - and I do not think that either the Secretary of tate or Mr Ross takes a different view.

14. But why have I set aside the MAT's decision? The point which the MAT overlooked has, after all, now been decided by me against the claimant and I have given full reasons for that decision. The answer lies in section 112(5) of the Social Security Act 1975. The section is headed "Appeal etc. on question of law to Commissioner". Subsection (5) provides as follows:

> "(5) On any such appeal or reference, the question of law arising for the decision of the Commissioner and the facts on which it arises shall be submitted for his consideration in the prescribed manner; and the medical appeal tribunal on being informed in the prescribed manner of his decision on the question of law shall give, confirm or revise their decision on the case accordingly."

That is to be contrasted with section 101(5)(a) which, in the case of appeals from the social security appeal tribunal, empowers the Commissioner to give the decision which he considers that the social security appeal tribunal should have given. I cannot myself lawfully give the decision which I consider that, in this case, the MAT should have given. I could, of course, send this case back to the MAT which gave the decision dated 21 July 1988 with a direction that that MAT should "confirm or revise" its decision in the light of what I have said herein. That would, presumably, mean that the MAT would come to the same conclusion but would reinforce it by repeating - or referring to - what I have said in paragraphs 5 to 13 above. That would be something of a charade - and, after careful consideration, I have decided not to adopt such a course in this case. I think it proper that the whole matter should go before a differently constituted MAT which can look anew at the whole case - save that, of course, it will be bound to reject the regulation 10(1)/mobility allowance contention advanced by or on behalf of the claimant.

15. Three other aspects of this case call for brief comment:

(1) Mr Featherstone urged that - at the least - an award of mobility allowance raised a very strong presumption that the claimant's disablement (in the context of disablement benefit) should be assessed at not less than 80%. I am not myself persuaded that that is so. No doubt a MAT assessing disablement in the context of disablement benefit will be interested to hear that the relevant claimant is in receipt of mobility allowance; but that MAT's duty is to make its assessment upon the basis of the written evidence before it, of the oral evidence and submissions which it hears and of its own examination of the claimant. That observation is, in fact, highlighted by the case now before me. I quote from the MAT's recorded findings:

> "To ascertain the extent to which the alleged disability is affecting the claimant he was asked to walk with the members. He walked briskly using a stick in his left hand with a slight left-sided limp for over 200 yards without complaint or indication of pain or distress, conversing throughout."

As I have already said (see paragraph 7 above), the papers in this appeal contain no documents relating to the award of mobility allowance - and I do not even know the date of that award. Of course, in respect of certain claimants the ability to walk "comes and goes" on different days; but there is no record of any suggestion by the claimant that 21 July 1988 was a particularly good day for him so far as walking ability was concerned. What is clear to anyone who has any acquaintance with the criteria upon which mobility allowance is awarded is that no MAT would have awarded it to the claimant in the light of the observations reflected by the passage which I have quoted above.

(2) By the decision the subject of this appeal the MAT reduced to 15% for life the award of 70% provisionally made by an AMA on 4 March 1988. Mr Featherstone stressed that two previous AMAs had (on 22 October 1986 and 22 April 1987, respectively) also come to an assessment of 70%. In the light of those assessments - he submitted - the reduction to 15% was so remarkable as to suggest error of law. Mr Ross replied that a degree of anomaly is inherent in this type of adjudication. Differently constituted AMAs and differently constituted MATs may - and frequently do - make substantially differing assessments in respect of the same set of facts. That is undoubtedly true - and is an element unavoidable when this type of issue is referred to human adjudication. I am bound to say - however - that the dramatic difference between the MAT's assessment and the assessment of three previous AMAs has influenced me when I made my recommendation that this case should be reconsidered de novo by a differently constituted MAT.

(3) Mr Featherstone further submitted that the MAT which gave its decision on 21 July 1988 appears to have based its decision entirely upon its assessment of the claimant's condition on that day. (Its decision, of course, related back to a period beginning on 19 April 1988.) Technically, that may be true. But if it were Mr Featherstone's only point in this appeal, I should not regard it as demonstrating vitiating error of law.

16. The claimant's appeal is allowed.

(Signed) J Mitchell
Commissioner

Date: 18 September 1989

MISSIONER'S FILE: CI/416/1988
PELLANT'S NAME: Anthony Carroll

This case concerns a MAT's assessment of the disablement resulting from an industrial accident.

The basic criterion for entitlement to severe disablement allowance is that disablement is assessed at not less than 80% (see subsection (5) of the substituted section 36 of the Social Security Act 1975). Regulation 10(1)(b) of the Social Security (Severe Disablement Allowance) Regulations 1984 provides that entitlement to mobility allowance shall be sufficient evidence of that required degree of disablement.

The claimant in this case was in receipt of mobility allowance (as it happens, on somewhat dubious grounds - see my paragraph 15(1)). The MAT whose decision was before me assessed disablement at 15%. (That assessment was, of course, made in the context of disablement benefit.) The well presented argument (on behalf of the claimant) was that the aforesaid regulation 10(1)(b) obliged the MAT to assess disablement at not less than 80%. I have rejected that contention. My conclusion may seem rather obvious. But the claimant's representative presented a careful and temperately framed argument - and I have seen fit to deal with that argument in some detail. (When I was discussing this case with DGR he expressed the hope that I could keep my decision short. He will be disappointed!)

Others may not regard the decision as star-worthy. I dare say that they have never been presented with the point. As it happens, however, this is the third case of my own in which the point has been raised; and this was the one in which the point was best argued on behalf of the relevant claimant. A reported (or, at least, readily accessible) decision may, in future, assist the speedy disposal of the issue. (It may be, of course, that my resolution of the point does not enjoy support.)

JM