Ref

OCIAL SECURITY ACTS 1975 TO 1981

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

REASONS FOR THE DECISIONS OF THE TRIBUNAL OF COMMISSIONERS IN THE CASES ON COMMISSIONER'S FILES SPECIFIED BELOW:-

A. FILE CM/4/82
B. FILE CM/31/82
C. FILE CM/63/82

1. The above three appeals were heard by us consecutively. In each case the claimant was the appellant, in case A being represented by Mr R Allfrey of counsel instructed by Mr W Parry Davies of the Hackney Law Centre; in case B by Mr J Hoggart of the Liverpool Welfare Rights Advice Centre; and in case C by Mr S Carruthers of counsel from the Free Representation Unit. The Secretary of State was represented in each case by Mr R G S Aitken from the Solicitor's Office of the Department of Health and Social Security. We are indebted to all these persons for their arguments.

tline of the Facts

2. Each of these appeals arises out of a claim for mobility allowance made in respect of a child who is able to walk and even run, but who is handicapped in some way that prevents or may prevent him from making proper use of his capacity to the full; and the question for determination by the medical appeal tribunal was whether in each case the child concerned satisfied the medical conditions for an award of the mobility allowance. In all three cases the medical appeal tribunal decided that the child did not satisfy those conditions; in case A and case C they were reversing the decision of the medical board, whereas in case B they were confirming the decision of the medical board.

3. The child in case A (to whom we shall refer as A) in the words of the medical appeal tribunal decision "... cannot move about freely and easily owing to his mental retardation; he is hyperactive with no sense of direction or danger". The child in case B (to whom we shall refer as B) suffers from Down's syndrome ometimes known as mongolism) with mental subnormality and epilepsy and is said to be very difficult to control. The child in case C (to whom we shall refer as C) is severely disabled as the result of his mother having contracted rubella german measles) during pregnancy. He is mentally impaired and hyperactive; he is blind in one eye and has very poor sight with the other eye (the lens having been removed) and he is almost deaf. The foregoing are not intended to be an exhaustive list of the symptoms of A, B and C, which are a matter for the medical appeal tribunal, and are intended only to assist in the understanding of the questions in issue.

The medical conditions of entitlement to Mobility Allowance

4. There are various conditions that require to be satisfied for an award of mobility allowance, but these appeals are all concerned with what we shall refer to as the "medical conditions". These conditions are to be found in section 37A(1) and (2) of the Social Security Act 1975 (set out in the Appendix to this Decision), their operation being materially affected by regulation 3 of the Mobility Allowance Regulations 1975 as amended (also set out in the Appendix). Stated briefly the

three medical conditions are:-

(1) that the claimant is suffering from physical disablement such that he is unable to walk or virtually unable to do so (section 37A(1));

(2) that his inability or virtual inability to walk is likely to persist for at least 12 months from the date of receipt of the claim (section 37A(2)(a));

(3) that during most of the period at (2) the claimant's condition will be such as permits him to benefit from enhanced facilities for locomotion.

Condition (1) is substantially affected by regulation 3 of the Mobility Allowance Regulations.

5. By virtue of regulation 13(1)(a), (b) and (d) of the Mobility Allowance Regulations (also set out in the Appendix) any question arising whether a person satisfies the three conditions above mentioned is termed a medical question; and those regulations provide for the determination of medical questions. Whenever there is any contest about medical questions the matter falls to be determined by a medical board or on appeal by a medical appeal tribunal; appeal lies to the Commissioner from the latter only on the ground that their decision is erroneous in point of law. When the medical board or medical appeal tribunal has finally pronounced on these questions the insurance officer (or on appeal the local tribunal or Commissioner) has to give a decision awarding or refusing the allowance. It is thus essential that the medical board or medical appeal tribunal should answer sufficient of the questions arising to enable the insurance officer etc to give their decision. Regulation 13(1)(c) makes a further question into a medical question, ie the likely duration of any inability or virtual inability to walk. This question does not relate to the fulfilment of the medical conditions but fixes the period for which the allowance can be awarded and is relevant on the question of what has been called motability. It is not in issue on these appeals.

6. It will be in view therefore that an insurance officer etc cannot award mobility allowance unless the medical authorities have given an affirmative answer to the question whether the claimant satisfies each of the three conditions (1), (2) and (3) listed in paragraph 4 above. A decision that the claimant fails to satisfy any one of those conditions will make it impossible to award the allowance and incidentally render it unnecessary to answer the question whether any other of the conditions is satisfied. In practice however it is usual that the real debate is on whether condition (1) is satisfied, no real question arising whether conditions (2) and (3) are also satisfied. It will be apparent from paragraphs 15 to 17 below that a claimant can show that he satisfies condition (1) in a variety of different ways. If the medical authorities find that he satisfies the condition in any one of those various ways they need consider nothing more in relation to condition (1). On the other hand they must, before they can decide that the condition is not satisfied, conclude that it is not satisfied in any one of those various ways.

The form and content of medical appeal tribunal decisions

7. The point last made places a considerable burden on the medical authorities, not only in relation to the decision itself but also in the case of the medical appeal tribunal in relation to the form and content of the decision. They are required by regulation 23(1) of the Social Security (Determination of Claims and Questions) Regulations 1975 to include in the record of their proceedings:-

"... a statement of the reasons for their decision including their findings on all questions of fact material to the decision." (our underlining).

The Department of Health and Social Security furnish a printed form MY 30 on which medical boards set out their record of proceedings and decision, and a duplicated form MY 365 for medical appeal tribunals. Form MY 30 contains a list of questions to be answered "Yes" or "No" in relation to the various medical questions. Form MY 365 contains a series of numbered paragraphs with alternative findings couched in positive and negative form, one of which has to be deleted in each case. Either form when properly completed will sufficiently enable the insurance officer to give a definitive decision on the claim. The medical appeal tribunal form opens with a paragraph in which the tribunal is called on to state whether the decision of the medical board is confirmed or not confirmed. In case B (the only case among those before us in which the decision of the medical board was confirmed) the medical appeal tribunal struck out the paragraphs that followed as being irrelevant. We were referred to a Decision on Commissioner's file CM/7/81 in which it appears to have been suggested (at paragraph 6) that this was desirable and that in addition to confirming the medical board's decision the tribunal should answer all the relevant questions. We do not consider this to be necessary in cases where the medical board has in its form answered all the relevant questions. The medical appeal tribunal can be accepted as having adopted the medical board's answers to those questions.

8. The medical appeal tribunal form (MY 365) contains also a space (often inadequate without supplementation) for the inclusion of "Reasons for the decision including findings on all material questions of fact". This is the most important part of the form. The relevant formal part of form MY 365 used in these appeals reads as follows:-

"2. The claimant's physical condition as a whole is such that

(a) he $\frac{\text{is}}{\text{is NOT}}$ unable to walk.

(b) he $\frac{\text{is}}{\text{is NOT}}$ virtually unable to walk.

(c) the exertion required to walk -

(i) $\frac{\text{would}}{\text{would NOT}}$ constitute a danger to his life.

(ii) $\frac{\text{would}}{\text{would NOT}}$ be likely to lead to a serious deterioration in his health."

In each of cases A and C the words "is NOT" and "would NOT" were left standing. In case B, as has already been mentioned, this part of the form was struck out as being inapplicable because the decision of the medical board (who had answered "No" to four analogous questions in form MY 30). In subsequent paragraphs of this Decision we shall indicate that the foregoing answers will never by themselves be sufficient to comply with regulation 23(1).

Compliance with regulation 23(1) (general)

9. Regulation 23(1) calls for a statement of the reasons for the decision and of the findings on all material questions of fact. We do not want to make it impossible for medical appeal tribunals to comply with this without bringing their work to a standstill. In Decision R(I) 18/61, it was indicated (in

paragraph 13) that in many cases a medical appeal tribunal can state their findings of fact and reasons very briefly. But it was nevertheless indicated that where some specific contention addressed to the tribunal has been rejected it would be necessary to give reasons for the rejection. We may add that this would seem to apply equally where in mobility allowance cases there is a specific finding in the formal paragraphs of form MY 365 to the contrary of the corresponding answer given by the medical board on form MY 30. Furthermore it is essential that a claimant whose claim has been rejected should be able to see on which of the various possible grounds for rejection his claim has failed.

10 As for findings of fact it is important that primary facts that are in dispute should be found and not just the conclusions drawn from them. The distinction between primary and secondary facts is often blurred; but we would take as an instance that where a claimant says that he cannot walk very far or that he cannot walk very far without pain there should be a finding of how far he can walk or of how far he can walk without pain. The conclusion of the tribunal that the pain involved does or does not amount to severe discomfort should also be stated, though the latter is more nearly an inference from the primary facts. Another instance is that in the case of behavioural inhibitions on walking, such as screaming fits or unreasoning refusals to walk, it should be recorded whether these occur frequently or only occasionally, and where practicable how often they occur.

11. We turn now to what can be omitted. It is not necessary to give reasons or making findings of fact on matters that are not put in issue. It is helpful to indicate that particular matters have not been put in issue but we do not think that this can be insisted on. Thus for instance a person who claims to be virtually unable to walk may seek to establish this in one or more of the different ways under regulation 3 of the Mobility Allowance Regulations. Strictly he cannot be held not to be virtually unable to walk until all possibilities have been exhausted. But where the claimant contends only for one or two of those possibilities it is sufficient in our judgment to deal only with those possibilities. We consider that in the Decision on file CM/7/81 the Commissioner at paragraph 7 was wrong in suggesting that on a mobility allowance claim a medical appeal tribunal should indicate their findings of fact on each of the component parts of regulation 3(1) and the decision ought not to be followed on this. It has to be remembered, however, that points can be raised not only expressly but also by necessary implication, and that it is not always easy to be certain what has been put in issue and what has not. In cases of uncertainty it is wise to be safe and treat a matter as in issue. The Secretary of State could assist medical appeal tribunals in this respect by indicating clearly in his written submission those matters that he is, and is not, seeking to put in issue.

Compliance with regulation 23(1) in the instant cases

12. In applying the foregoing to the cases before us we would observe first that the negative statements left standing in form MY 365 by the medical appeal tribunals in cases A and C and the corresponding negative answers of the medical board adopted by the medical appeal tribunal in case B are inadequate by themselves because they fail to tell the claimant why his contention has failed. The answers may mean that he is not unable to walk etc or that though he is unable to walk etc this is not because of his physical condition. It is always necessary for the reasons to make it clear which of these is meant (occasionally both may be meant). It is very common for a medical appeal tribunal to indicate that they find that a claimant is not unable to walk in the statement of their reasons and not to mention whether or not this is because of his physical condition. This will in

our judgment sufficiently indicate to a claimant which of the two alternative interpretations of the formal finding is intended. It is in our judgment open to the medical appeal tribunal to take the two parts of the question in whatever order they prefer, and if their finding on the first point taken is adverse to the claimant to make no finding on the other. It is of course necessary that there should be an adequate statement of reasons and finding of material facts on the part of the question on which they have elected to make their determination. By contrast a tribunal cannot give an affirmative answer without reaching a conclusion favourable to the claimant with reasons and findings of fact on each part of the question.

13. The matter that has given rise to the greatest difficulty is the statement of reasons and findings of fact relevant to the question whether the claimant is or is not unable to walk or virtually unable to do so. Regulation 3 of the Mobility Allowance Regulations (set out in the Appendix) lays down the only circumstances in which a claimant may be found to be unable or virtually unable to walk. But though restrictive in form the regulation does give some indication of the kinds of circumstances in which a person may be regarded as virtually unable o walk that are wider than those in which without the assistance of the regulation some medical authorities would have been prepared to hold a person to be virtually unable to walk.

14. The first of the "circumstances" mentioned (in sub-paragraph (a)) is that the claimant is unable to walk. This adds nothing to the words of the Act itself. In paragraph 22 below we indicate the view that a person may be found not to be unable to walk notwithstanding that he is unable to walk without assistance from another person as well as without the assistance of the prostheses and artificial aids mentioned in regulation 3(2). We consider that a person who can walk at all ought not to be regarded as unable to walk, though he may well be regarded as virtually unable to walk. This does not of course preclude the medical authorities from finding that a claimant's method of moving about does not amount to walking at all.

15. Sub-paragraph (b) of regulation 3(1) deals with the case where the claimant's ability to walk out of doors is so limited as regards:-

(i) the distance over which, or

(ii) the speed at which, or

(iii) the time for which, or

(iv) the manner in which

he is able to make progress on foot without severe discomfort that he is virtually unable to walk. Although the end of the sub-paragraph leaves it to the medical authorities to determine in the light of the above whether the claimant is virtually unable to walk, the earlier words call for a statement of findings on all relevant matters raised expressly or by necessary implication. It was held, rightly in our judgment, in Decision R(M) 1/81 that it was obligatory to take into account not only the limitations in the four respects mentioned on the ability to make progress on foot without severe discomfort but also such limitations on a claimant's ability to make progress on foot irrespective of severe discomfort. There are

thus potentially eight matters for consideration though it must be unusual for all eight to be in issue simultaneously. Thus in our judgment it is only necessary to consider the question of severe discomfort if the contention is put forward (in however misconceived a manner), or it is to be inferred from the facts that severe discomfort is involved. In cases in which severe discomfort is said to be involved it may be unnecessary to mention the extent of inability to walk irrespective of severe discomfort. Either way the number of possibilities will probably be reduced to no more than four. Then again, as the distance walked is the product of the time and the speed, it will be common for the consideration of the distance for which a person can walk to comprehend the speed and the time factors, though there may be cases in which the real limiting factor is the speed or even the time at or for which the person concerned can make progress on foot or can do so without severe discomfort. In cases involving the distance over which a person can make progress on foot there ought always to be a finding of the relevant distance (whether with or without severe discomfort); and in cases where the speed is in issue of the time taken to go that distance. If it is contended that there is a limitation in the time for which walking can continue a finding of fact on this contention should be made. Contentions about limitations in the manner of making progress on foot are quite separate and are commonly met with not only in relation to persons whose physical disabilities cause them to walk in a peculiar way, but in cases where it is contended that the claimant's walking is erratic or frustrated by temperamental considerations. Where this is contended there should be recorded findings as to the matters alleged, including particulars of the frequency of occurrence of behavioural difficulties.

16. Sub-paragraph (c) of regulation 3(1) is concerned with claimants to whom the exertion required to walk is dangerous to life or health; and the present appeals are not concerned with such persons. We need only say that we agree with the conclusion reached in Decision R(M) 1/79 that the medical authorities need not refer to this kind of deemed inability to walk (in that decision called constructive inability to walk) when no point about it has been raised either expressly or by implication.

The actual decisions in the instant cases

17. In case A the medical appeal tribunal, after recording their main formal conclusions in the manner indicated in paragraph 8 above, expressed their reasons etc as follows:-

> "We have read the Scheduled Evidence. We have heard Miss [HS] on behalf of the claimant as well as Mrs [R]. We accept that [A] is not unable in the sense that he cannot move about freely and easily owing to his mental retardation; he is hyperactive with no sense of direction or danger. We observed him walking and he walks well. We find that [A] is not unable to walk nor does he fulfil the criteria laid down in Reg 3(1)b and is thus not virtually unable to walk. Reg 3(1)c does not arise."

The Secretary of State has made a submission that the tribunal cannot be seen to have answered the question whether and if so to what extent A was able to walk without severe discomfort. Although a submission was made to us about the meaning of severe discomfort (with which we deal in paragraph 26 below) we cannot find that any such contention was made before the tribunal so far as the case papers go; nor do we consider that such a contention is to be inferred from the nature of A's disabilities. But having regard to the submission of the Secretary of State

we accept that the decision should be set aside. In view of the conclusion that the claimant was not unable or virtually unable to walk it was unnecessary for the tribunal to consider whether this was the result of A's physical condition (see paragraph 12 above). In the event that the tribunal to whom the matter is now referred takes a different view on A's inability or virtual inability to walk they will of course have to go on to consider the question whether this is the result of physical disablement.

18. In case B the medical appeal tribunal after confirming the medical board's conclusion (see paragraphs 7 and 8 above) expressed their reasons etc at somewhat greater length than those in case A. In the course of doing so they made it clear that there had been a submission that the child's limitations "characterised severe discomfort". They did not in fact deal with this submission at all. It is quite possible that they regarded it as misconceived, but it was a specific point made in the case and had to be dealt with. On this ground we find the statement of reasons inadequate and we set the decision aside.

19. In case C the medical appeal tribunal after making the findings indicated paragraph 8 above gave the following statement of reasons etc:-

> "We have heard the parties and read all the evidence. We have seen [C] walk and run with a normal gait. We do not agree that 'safely' is part of the ordinary meaning of the verb 'to walk'. A refusal to walk and outbursts of temper have no relationship to 'virtual inability to walk'. We accept that [C] must always be accompanied out of doors and for this Attendance Allowance is in issue. We have a great deal of sympathy with this case but in the light of the claimant's evidence and our own observations of [C], we are bound to say that he can walk."

We are immediately struck with the fact that the ultimate finding is that C is not unable to walk and that there is no mention of his not being virtually unable to walk. This omission is all the more striking when it is noticed that the medical board in the case answered "Yes" to the question whether his physical condition as a whole was such that he was virtually unable to walk. Further the observation in the reasons given by the tribunal to the effect that a refusal to walk and outbursts of temper have no relationship to virtual inability to walk is in our judgment much too wide. In paragraphs 23 to 25 below we indicate that these matters (as well as the facts not mentioned in the decision that C is also blind and almost deaf) all to be considered as a whole in connection with virtual inability to walk. We therefore hold that the statement of reasons in this decision also was inadequate and set the decision aside.

The construction of the Act and Regulations

20. Strictly speaking our conclusions on the content of the decisions makes it unnecessary to go into the matters of law that were debated before us. But for the guidance of the tribunals to whom the matter is referred back we think it right to deal with some of the points on the construction and effect of the Act and regulations that were so debated. In this connection we were invited by Mr Hoggart to look at Hansard, at press releases made by the Department of Health and Social Security and at the report of the National Insurance Advisory Committee ((Cmnd 7491) to which we will refer as "the NIAC report") leading to the introduction of regulation 3 in its present form. Mr Hoggart submitted that as we were "not a court of law" the normal rules as to the documents at which a court can look as an aid to interpretation did not apply. We do not agree with this. The

statutes and regulations that have to be interpreted by insurance officers, and to those whom appeal lies from them, must be interpreted in accordance with the same rules of construction as will fall be applied in the event of there being an appeal on a point of law from the Commissioner to the Court of Appeal or Court of Session. We do not consider that we should look at what appears in Hansard or the press releases of the Department. It is well settled that it is not permissible to look at Hansard as an aid to the interpretation of legislation (see per Lord Reid in Black-Clawson Ltd v Papierwerke AG [1975] AC 591 at pages 614-615 and per Lord Diplock in Hadmore Productions v Hamilton [1982] 2 WLR 322 at page 337). Press releases, which merely represent the Department's views on the meaning of legislation, are manifestly still less authoritative. On the other hand the case first cited shows that, for certain limited purposes only, the report of a committee leading to the passing of an enactment may be looked at; but those limited purposes do not include using such a report as an indication of the intention of the legislature.

21. The position of the NIAC report and other reports of analogous committees including now the Social Security Advisory Committee is somewhat different from generality of such committee reports. Sections 138 and 139 of the Social Security Act 1975 provided for the continuance in existence of the then existing National Insurance Advisory Committee (NIAC) and required the Secretary of State (subject to exceptions) to refer drafts of any proposed regulations to NIAC for consideration, consider their report and to lay the report before Parliament. These sections have now been replaced by sections 9 and 10 of the Social Security Act 1980, which established the Social Security Advisory Committee, and make similar provision for reference of draft regulations to them. The amendments made by the Mobility Allowance Amendment Regulations 1979 were in fact submitted in draft, and the NIAC report is the report on that draft; and the preamble to the regulations as enacted refers to the fact that such reference had been made. It was decided by a Tribunal of Commissioners in Decision R(G) 3/58 that in the light of the corresponding provisions then in force NIAC reports stood in a special position, and that it was permissible to look at such a report to resolve an ambiguity though not to contradict the clear words of a regulation. We do not consider that there is anything in the Black-Clawson decision which invalidates this conclusion, as the point simply did not arise in connection with the committee report with which that case was concerned.

The meaning of the word "walk"

22. "Walk" is an ordinary English word and mindful of what was said by Lord Reid in Cozens v Brutus [1973] AC 854 at page 861 we do not propose to attempt any definition (though we would point out that a definition was attempted in Decision R(M) 3/78 at paragraph 10). The argument before us centred round the question whether the word "walk" in regulation 3 included walking with guidance, supervision or support (to which we shall comprehensively refer as "assistance"). Mr Allfrey submitted strongly that it could only be so construed if regulation 3(1)(b) opened with words like "his ability to walk with assistance if necessary ..." and not just with the words "his ability to walk ...". The converse argument would be that if only walking without assistance were intended, words like "without assistance" would be included. He relied strongly on the fact that regulation 3(2) specified certain kinds of artificial assistance which had to be taken into account and argued that this meant that other kinds of assistance had to be disregarded.

.e supported his argument by reference to Commissioner's Decision R(M) 2/81. That case concerned a claimant who was blind, and suffered from a physical disablement in his balance mechanism that made it impossible for him to control the direction in which he wished to move. The decision was governed by the pre-1979 law when the interpretation of "virtually unable to walk" was at large. The medical appeal tribunal, adopting reasoning very similar to that put forward by Mr Allfrey, found the claimant to be unable to walk, and their decision was upheld by the Commissioner. There was as it seems to us ample evidence on which the medical appeal tribunal could have reached the conclusion that the claimant was at least virtually unable to walk; but if this was a decision that a person who is able to walk only with assistance is for that reason alone necessarily to be found unable or virtually unable to walk we disagree with it. The argument that on any other construction of the regulations regulation 3(2) is superfluous is, if valid, applicable to regulation 3(1)(a) as well as regulation 3(1)(b) and we do not consider that "unable to walk" in regulation 3(1)(a) means unable to walk without assistance as we have defined it. No-one would say of a fit child of five whom it was unsafe to allow out in the street unsupervised that he was either unable or virtually unable to walk. We consider that the need for such assistance is a facet of the manner in which a person can make progress on foot id is to be taken into account by the medical authorities in conjunction with any other matters in determining whether in terms of regulation 3(1)(b) the person concerned is virtually unable to walk.

Behavioural factors inhibiting walking

23. The most obvious instance of a person who qualifies for the mobility allowance is that of a person who has no use in his legs. None of the claimants in the cases before us falls into that category. It seems that all of them can not only walk but run. Their problems are created by other factors such as inability to move from one place to another as desired because of a tendency to walk erratically or in circles or by a temperamental refusal to move from time to time or to move at all or by the impracticability of his being allowed out unsupervised. In the Down's syndrome case (R(M) 2/78) the child in question behaved so erratically that it severely impaired his mobility and the medical appeal tribunal found not only that he was virtually unable to walk but that it was because of a physical disorder due to faulty genetic inheritance. The Secretary of State appealed to the Commissioner submitted that it was not the Down's syndrome which prevented the child from walking but the mental effect of that condition and that this was not physical disablement. The Commissioner rejected this submission and held it to be for the medical authorities to decide what was physical and what was not. This conclusion was accepted as correct in the NIAC report at paragraph 7. The 1979 regulations made no express attempt to reverse the conclusion. We consider that we should accept it as correct. In doing so we emphasise that the author of the decision indicated at paragraph 19 that his conclusion did not mean that all sufferers from Down's syndrome qualifed for the mobility allowance.

24. We were referred to three more recent decisions on persons whose ability to walk was inhibited by blindness, one of which is to be taken to the Court of Appeal. These are R(M) 2/81 above referred to and the unreported decisions CM/1/82, which is to go before the Court of Appeal, and CM/2/82. It has been suggested that CM/1/82 cannot be reconciled with the other two. It is to be noted however that in each case the conclusion of the medical appeal tribunal (whether favourable or adverse to the claimant) was upheld. In our view there was in each of those

cases ample evidence on which the respective tribunals, properly interpreting the law, could reach the conclusions which they did reach. This is not to say that we shall necessarily be taken to agree with everything that the various Commissioners said in upholding the decisions in question. In particular (1) we think that the Commissioner who gave Decision CM/1/82 (like the medical appeal tribunal in case C in the passage referred to in paragraph 19 above) stated the matter too widely when in paragraph 11 of the decision he expressed the view that the 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 into account in determining whether she satisfied regulation 3(1)(a) or (b); and (2) in paragraph 22 above we indicated our dissent from one of the possible implications of what was said by the Commissioner in R(M) 2/81. The question whether a claimant is to be regarded as virtually unable to walk having regard to the matters mentioned in regulation 3(1)(b) is clearly a matter of degree and one cannot be altogether suprised if differing cases are found to fall on opposite sides of the line. In the present cases the tribunals before whom the appeals come for rehearing will have to consider questions of degree, namely in each case whether taking into account the matters mentioned in regulation 3(1)(b) the child in question is virtually unable to walk.

25. The main question in each case will be whether the child is so incapable inasmuch as his ability to walk out of doors is so limited as regards the manner in which he is able to make progress on foot, since behavioural limitations on a person's walking generally affect the manner of walking. It is possible also that speed of walking from place to place may enter into it. It will clearly be relevant that tantrums or refusals to walk are of frequent occurrence or not. We accept the submission made to us 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. It follows 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. There may be other factors such as blindness and deafness as in case C to be taken into account in addition.

26. Before leaving this matter we must refer to two arguments put to us that we do not accept. The first relates to "severe discomfort". Mr Allfrey pointed out that regulation 3(1)(c) relates to those for whom the exertion required to walk would be dangerous. It does not cover cases where the danger in walking results not from exertion but from other things, eg a blind man's falling over obstacles or stepping in front of traffic. He argued that it would be absurd that people for whom walking was dangerous for other reasons should not qualify for the allowance and that therefore they must fall under regulation 3(1)(b) and in particular under the part of that regulation relating to "severe discomfort". He submitted accordingly that the words "without severe discomfort" must be interpreted as meaning "without risk of severe discomfort" and that a person who could not be allowed to go out of doors unattended for fear of his being injured in a street accident could not do so without risk of severe discomfort. This submission involves imputing to the draftsman the rather heavy humour of describing the risk of being run over as a risk of severe discomfort and we do not think that the words used are appropriate to carry the meaning suggested. In our view indeed the words "severe discomfort" relate to matters like pain and breathlessness that may be brought on by walking. In Decision CM/1/81 (not reported) the Commissioner expressed the view that regulation 3(1)(b) confined the description of "virtually

unable to walk" to conditions in which walking caused severe discomfort. He subsequently retracted this opinion (see Decision R(M) 1/81 at paragraph 13). While we consider that he was right to retract the opinion, we nevertheless agree with the view expressed in paragraph 5 of Decision CM/1/81 that the term "severe discomfort" in regulation 3(1)(b) does not extend to the screaming attack of an autistic child or the refusal to walk of the child suffering from Down's syndrome, who case was the subject of Decision R(M) 2/78. These are the consequence of resistance to the idea of walking and rather than of the walking itself.

27. The second submission that we reject is that made by Mr Carruthers with reference to the statement of the reasons of the decision in case C. In that case the medical appeal tribunal observed in connection with the fact that C required always to be accompanied that attendance allowance was in payment. Mr Carruthers submitted that this was not a legitimate matter to be taken into account. We accept that it is undoubtedly possible for a person to qualify simultaneously for the attendance allowance under section 35 of the Social Security Act 1975 and the mobility allowance under section 37A. But, as we have mentioned, an argument was addressed to us by Mr Allfrey (and a similar one may have been addressed to the medical appeal tribunal in case C) to the effect that it should be held that the mobility allowance ought to be construed as extending to the risk of severe discomfort by street accident. The basis of this argument was the alleged anomaly of a person qualifying for it if the exertion of walking was dangerous but not if the risk of accident on going out unattended was dangerous. It is in our view perfectly legitimate to counter that argument by pointing to other provisions of the Act which could be construed as providing other benefit in the supposedly anomalous case. The mobility allowance is plainly intended to furnish some contribution towards the cost of providing mobility for the claimant. The provisions of section 37A(2)(b) (relating to the claimant's condition being such as permits him to benefit from enhanced facilities for locomotion) and of section 37A(6) and (6A) (relating to what is sometimes called motability) make this clear. Equally the attendance allowance is intended to make some contribution towards the cost of furnishing attention or supervision (see Regina v National Insurance Commissioner, Ex parte the Secretary of State for Social Services [1974] 1 WLR 1290 at page 1292). It is thus entirely appropriate to consider that what otherwise might be an anomaly if there were only a mobility allowance is not an anomaly when it is considered that there is also an attendance allowance. We may add that in Regina v National Insurance Commissioner, Ex parte the Secretary of State for Social Services [1981] 1 WLR 1017 at page 1022 Lord Denning MR alluded to the fact that a person giving attention to a disabled person might qualify for invalid care allowance as relevant to his conclusion that the attendance allowance board had not erred in refusing the higher rate of attendance allowance.

(Signed) I O Griffiths
Chief Commissioner

(Signed) J G Monroe
Commissioner

(Signed) V G H Hallett
Commissioner

APPENDIX

Relevant Provisions of the Act and Regulations

I

Section 37A(1) and (2) of the Social Security Act 1975

(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 unable to walk or virtually unable to do so.

(2) Regulations may prescribe the circumstances in which a person is or is not to be treated for the purposes of this section as suffering from such physical disablement as is mentioned above; but a person qualifies for the allowance only if-

(a) his inability or virtual inability to walk is likely to persist for at least 12 months from the time when a claim for the allowance is received by the Secretary of State [for Social Services]; and

(b) during most of that period his condition will be such as permits him from time to time to benefit from enhanced facilities for locomotion.

II

Regulation 3 of the Mobility Allowance Regulations 1975 [S.I. 1975 No. 1573] as amended by the Mobility Allowance Amendment Regulations 1979 [S.I. 1979 No. 172]

(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 his physical condition as a whole is such that, without having regard to circumstances peculiar to that person as to place of residence or as to place of, or nature of, employment -

(a) he is unable to walk; or

(b) 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

(c) 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.

(2) A person shall not 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 he is not unable or virtually unable to walk with a prosthesis or an artificial aid which he habitually wears or uses or if he would not be unable or virtually unable to walk if he habitually wore or used a prosthesis or artificial aid which is suitable in his case.

III

Regulation 13(1) of the Mobility Allowance Regulations 1975

In these regulations any question arising in connection with a claim for or award of allowance-

(a) whether a person is suffering from physical disablement such that he is unable to walk or virtually unable to do so; or

(b) whether such inability or virtualy inability to walk is likely to persist for at least 12 months from a specified date; or

(c) for what period, being a period limited by reference either to the person's attaining pensionable age (our underlining) or to a definite earlier date, the person may be expected to continue to be unable, or virtually unable, to walk; or

(d) whether during most of the period during which a person may be expected to continue to be unable, or virtually unable to walk, his condition will be such as permits him from time to time to benefit from enhanced facilities for locomotion,

is referred to as a medical question.

TE: The above regulation was amended with effect from 13 January 1982 by gulation 3 of the Mobility Allowance (Amendment) Regulations 1981 [S.I. 1981 No. 1817] which substitute the words "the age of 75" for the words underlined above.

JK

SOCIAL SECURITY ACTS 1975 TO 1981

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

DECISION OF A TRIBUNAL OF SOCIAL SECURITY COMMISSIONERS

1. Our decision is that the decision of the medical appeal tribunal dated 12 January 1981 is erroneous in point of law and it is set aside accordingly. The matter must be referred back to the medical appeal tribunal, which in accordance with the normal practice should be differently constituted from that which gave the decision set aside.

2. This appeal is one of three that were heard by us consecutively and, as we indicated at the hearing, we consider that each decision appealed from is erroneous in point of law inasmuch as it fails to comply adequately with the requirement of regulation 23(1) of the Social Security (Determination of Claims and Questions) Regulations 1975 [S.I. 1975 No. 558] as to the inclusion in the record of the decision of a medical appeal tribunal of a statement of the reasons for the decision including their findings on all questions of fact material to the decision.

3. Argument at the hearing was not confined to the question of the form of the decisions and extended over areas of the substantive law relating to the mobility allowance with a view to our giving some guidance to the tribunals to whom the matter is referred back. The full reasons for our decisions in the three appeals together with our conclusions on some of the points of law debated at the hearing are contained in the composite statement of reasons for the decision in the three cases annexed hereto.

(Signed) I O Griffiths
Chief Commissioner

(Signed) J G Monroe
Commissioner

Commissioner's File: CM/4/1982
DHSS File: B.51023/354

(Signed) V G H Hallett
Commissioner

(Date) 4 January 1983

T IK

SOCIAL SECURITY ACT 1975 TO 1981

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

DECISION OF A TRIBUNAL OF SOCIAL SECURITY COMMISSIONERS

1. Our decision is that the decision of the medical appeal tribunal dated 8 October 1981 is erroneous in point of law and it is set aside accordingly. The matter must be referred back to the medical appeal tribunal, which in accordance with the normal practice should be differently constituted from that which gave the decision set aside.

2. This appeal is one of three that were heard by us consecutively and, as we indicated at the hearing we consider that each decision appealed from is erroneous in point of law inasmuch as it fails to comply adequately with the requirement of regulation 23(1) of the Social Security (Determination of Claims and Questions) Regulations 1975 [S.I. 1975 No. 558] as to the inclusion in the record of the decision of a medical appeal tribunal of a statement of the reasons for the decision including their findings on all questions of fact material to the decision.

3. Argument at the hearing was not confined to the question of the form of the decisions and extended over areas of the substantive law relating to the mobility allowance with a view to our giving some guidance to the tribunals to whom the matter is referred back. The full reasons for our decisions in the three appeals together with our conclusions on some of the points of law debated at the hearing are contained in the composite statement of reasons for the decision in the three cases annexed hereto.

(Signed) I O Griffiths
Chief Commissioner

(Signed) J G Monroe
Commissioner

Commissioner's File: CM/31/1982
DHSS File: B.51023/393

(Signed) V G H Hallett
Commissioner

(Date) 4 January 1983

T/RJK

SOCIAL SECURITY ACTS 1975 TO 1981

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

DECISION OF A TRIBUNAL OF SOCIAL SECURITY COMMISSIONERS

1. Our decision is that the decision of the medical appeal tribunal dated 24 August 1981 is erroneous in point of law and it is set aside accordingly. The matter must be referred back to the medical appeal tribunal, which in accordance with the normal practice should be differently constituted from that which gave the decision set aside.

2. This appeal is one of three that were heard by us consecutively and, as we indicated at the hearing we consider that each decision appealed from is erroneous in point of law inasmuch as it fails to comply adequately with the requirement of regulation 23(1) of the Social Security (Determination of Claims and Questions) Regulations 1975 [S.I. 1975 No. 558] as to the inclusion in the record of the decision of a medical appeal tribunal of a statement of the reasons for the decision including their findings on all questions of fact material to the decision.

3. Argument at the hearing was not confined to the question of the form of the decisions and extended over areas of the substantive law relating to the mobility allowance with a view to our giving some guidance to the tribunals to whom the matter is referred back. The full reasons for our decisions in the three appeals together with our conclusions on some of the points of law debated at the hearing are contained in the composite statement of reasons for the decision in the three cases annexed hereto.

(Signed) I O Griffiths
Chief Commissioner

(Signed) J G Monroe
Commissioner

(Signed) V G H Hallett
Commissioner

(Date) 4 January 1983

Commissioner's File: CM/63/1982
DHSS File:B.51023/430