MASTER Mobility Allowance - "cannot" versus "can't" walk

LB/1/LS

Commissioner's File: CM/005/1986
DHSS File: B.51023/1007

SOCIAL SECURITY ACTS 1975 TO 1986
APPEAL FROM DECISION OF MEDICAL APPEAL TRIBUNAL ON A QUESTION OF LAW
DECISION OF THE CHIEF SOCIAL SECURITY COMMISSIONER

Name: Barbara Mary Curwood (Mrs) on behalf of Scott Mark Curwood
Medical Appeal Tribunal: Nottingham
Original Decision Case No: 100/2/85

[ORAL HEARING]

1. My decision is that the decision of the medical appeal tribunal given on 15 July 1985 is erroneous in law. Accordingly I set it aside and remit the case for determination by a differently constituted medical appeal tribunal.

2. I held an oral hearing of this appeal at which the claimant was represented by Mr. I. James a Welfare Rights Officer of the Nottingham County Council with the Community Mental Handicap Team and the adjudication officer was represented by Mr. B. Brogan, a solicitor, of the Solicitor's Office of the DHSS. I am grateful to them both for their submissions.

3. The claimant's son was born on 15 October 1972; he is autistic. The claim for mobility allowance in respect of the son was unsuccessful; his mother appealed but unsuccessfully, and she now appeals to a Commissioner from the adverse decision of the medical appeal tribunal. After the decision of the medical appeal tribunal the House of Lords determined the case of Lees v. Secretary of State for Social Services [1985] A.C. 930 and that decision was considered in relation to certain authorities in this jurisdiction by a Tribunal of Commissioners, whose decision is to be reported as Decision R(M) 3/86. As the Secretary of State submitted in his written submission and was agreed on behalf of the claimant the medical appeal tribunal did not adequately to address itself to the reason for the interruptions in the son's walking or to the degree and frequency of those interruptions. I agree. This is an error of law which leads to the appeal being allowed and it is not necessary for me to go further into this aspect of the matter.

4. The relevant conditions governing entitlement to mobility allowance are those in section 37A of the Social Security Act 1975 as supplemented by regulation 3 of the Mobility Allowance Regulations 1975 [SI 1975 No. 1573] as amended. So far as relevant these provisions run 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."

Regulation 3 runs (as amended) -

> "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 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 an artificial aid which is suitable in his case."

5. It is accepted on behalf of the Secretary of State that the son's autistic condition is a "physical disablement" within the meaning of section 37A(1) and regulation 3.

6. The tribunal to which this matter is remitted should in particular direct its attention to each of the alternatives in regulation 3(1)(b). It is settled that it is necessary 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 person's ability to make progress on foot irrespective of severe discomfort - see the Decision of a Tribunal of Commissioners R(M) 1/83 at paragraph 15 approving the Decision of a Commissioner R(M) 1/81 at paragraph 9. The criterion is the ability to walk outdoors without discomfort - R(M) 1/81 ibid.

7. The Decision of the Tribunal of Commissioners in R(M) 3/86 has settled that while the Lees Case was concerned with the position where there was the physical ability to walk but not to control the direction of walking it did not impinge upon the decision of the then Chief Commissioner in R(M) 2/78. As the Tribunal of Commissioners put it at paragraph 8 -

"However, if the claimant was unable to walk or virtually unable to walk in accordance with the above criteria, [limitations upon the ability to walk] then the next question was whether this condition was attributable to some physical impairment such as damage to the brain. The criterion was whether the claimant could not walk, as distinct from would not walk. We agree with the importance of that distinction" - (original underlining)

8. In paragraph 17 of R(M) 2/78 the Chief Commissioner said this, referring to the medical appeal tribunal in that case:-

"In so far as there was any mental element which prevented Robert from walking (he has an accepted mental age of 2 years) they attributed his virtual inability, not to conscious volition or mental disability, but to "reaction" itself directly due to his physical condition".

The word "reaction" derives from the following finding of the medical appeal tribunal -

"We accept the evidence that while he walks for some yards he is liable to run, stop, lie down and refuse to go further; this reaction which seriously impairs mobility is due

directly to the physical condition of mongolism". - as set out in paragraph 11 of Decision R(M) 2/78.

9. The terms "reaction" or "temporary paralysis" (R(M) 3/86 paragraphs 4 and 9) are not of course terms used by the material statutory and regulatory provisions and should not be relied on in place of those provisions.

10. As appears from Decision R(M) 3/86 at paragraph 8, the first question is to whether in fact there is (relevantly) a virtual inability to walk within regulation 3(b) and the second question is whether if so how did that virtual inability to walk come about, since if it was an act of conscious volition not brought about by physical disablement then entitlement is not established. On the second question the issue is causation.

11. Following the passage which I have already set from paragraph 8 of Decision R(M) 3/86 the Tribunal of Commissioners said:-

> "Manifestly, if a child, who has been walking perfectly satisfactorily decides to stop, but his refusal to continue further can be overcome by the promise of a reward or the threat of punishment there can be no question of his stopping having arisen out of a physical condition over which he has no control. In the case postulated, he was making a conscious choice, and on no footing could his refusal to walk be identified with a physical disablement."

The passage continues with the following sentence -

> "It is, of course, for the tribunal as a medical matter to determine whether a child's propensity to cease walking is to be attributed to a deliberate election on his part or to a physical disablement."

In my judgment the Tribunal of Commissioners is not in the above passages seeking to lay down that wherever a refusal to continue walking can be overcome by a promise of reward or a threat of punishment then the conclusion has to be that the reason for stopping walking was a conscious choice. As Mr. James pointed out, if this were the true interpretation of this passage in its context, the causation of the stopping would apparently be determined by the means of re-starting. I am satisfied that read as a whole and in context the Tribunal of Commissioners was not purporting to lay down any such thing, in particular because in the last sentence which I have set out the Tribunal of Commissioners (accurately I respectfully agree) sets out the issue as between the propensity to cease walking being attributable either to a deliberate election or to a physical disablement. As both advocates before me agreed and I also agree, what has to be done to get a person to re-start walking, how long it takes, how frequently it has to be done, whether the circumstances vary and so forth are matters which are or may be relevant in the determination of the causation of the person concerned stopping walking - this is for the medical authority to decide. The Tribunal of Commissioners was giving an example and the premise in my judgment upon which it was proceeding for that example was that the child had voluntarily decided to stop walking and, under persuasion (as Mr. Brogan put it) decided to start walking again. The passage should not however in my view be used other than as pointing to the possible relevance of the re-starting in connection with the causation and significance of the stopping.

12. It is not I think necessary for me to rehearse the medical evidence which is available in this case since of course the tribunal to which this matter is remitted will consider it carefully. Mr. Brogan however pointed out the possible danger of the tribunal to which this matter is remitted giving possibly excessive weight to the walking test which usually forms part of the hearing of these cases. He pointed out that in cases such as these one day may not be like another and that the history of the matter has a particular relevance. Mr. James agreed. I think this is right, and the tribunal to which this matter is remitted should have the point in mind.

13. Mr. Brogan also pointed out two other matters in the case papers which might be misleading. I agree, and I draw the attention of the tribunal to which this matter is remitted to them. The first arises on the report of the Medical Board dated 6 December 1984 which relates to the following condition in section 37A(2) (as it was before amendment on 1 October 1986) -

> "...but a person qualifies for the allowance only if -
>
> (a) his ability 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; 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."

In relation to that criterion the Medical Board stated -

> "He has no interest in being taken out, and could not enjoy any trip".

Mr. Brogan submits and I agree that interest and enjoyment while no doubt relevant are too limited an application of the condition in section 37A(2)(b).

14. Mr. Brogan's other point on the same medical report refers to the sentence in the assessment of walking ability -

> "He would require constant supervision and cajoling particularly to avoid danger to himself."

I agree with Mr. Brogan that this is a reference to regulation 3(1)(c), that it applies where the exertion would constitute a danger to life or would be likely to lead to a serious deterioration in health, but that the board addressed itself not to the exertion required but to the need for supervision and persuasion. I agree that this was wrong.

15. I have noted that the amendments to section 37A of the Social Security Act 1975 set out in section 71(1) to (3) of the Social Security Act 1986 came into force on 1 October 1986.

16. My decision is as in paragraph 1.

(Signed) Leonard Bromley
Chief Commissioner

Date: 21 January 1987