mobility allowance — [illegible]

LB/1/LS

Commissioner's File: CM/14/1985
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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: [redacted]
Medical Appeal Tribunal: London South
Original Decision Case No: [redacted]
Application for leave Case No: Not known

[ORAL HEARING]

1. My decision is that (by the effect of subsequent binding authority to which I shall come) the medical appeal tribunal which determined the appeal in this matter on 5 July 1984 erred in law. I accordingly allow the claimant's appeal and remit the matter 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 Miss Sally Robertson of the Disability Alliance and the Secretary of State was represented by Miss Judith Rowe of counsel. I am extremely grateful to them both for their careful and helpful submissions.

3. The case concerns mobility allowance. It was necesary to defer the oral hearing in this matter until there had been decided (and the parties had had the opportunity of considering the judgments in) a case in the House of Lords Lees v. Secretary of State for Social Services (reported in [1985] AC 930) and a consequential decision in this jurisdiction of a Tribunal of Commissioners the reference to which is CM/173/1985 (reported as R(M) 3/86).

4. Mrs T's daughter Geraldine was born on 4 July 1956 and thus when the medical appeal tribunal sat on 5 July 1984 she was aged 28 years. She has been severely mentally handicapped since birth and has the mental age of a child of 2. She has what one of the doctors has described as "a localised anatomical abnormality" at the hips and walks with a wide-based rolling gait. She is in her walking thoroughly unpredictable, easily stops and easily tires. Having seen her it is easy to appreciate and sympathise with the strain which looking after this now fully-grown woman imposes upon her mother.

5. 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 disability such that he is either unable to walk or virtually unable to do so."

Regulation 3 (as amended) runs as follows -

"3.-(1) A person shall only be treated, for the purposes of section 37A, as suffering from physical disability 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 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".

6. In its findings the medical appeal tribunal described watching Geraldine walk and stated that it took "considerable cajoling" to persuade her to move on again. The second paragraph of the findings was as follows:-

"We do not consider that the difficulty and cajoling necessary to get the child from A to B is as severe as is contemplated in R(M) 1/83. We are however not able to say that throughout the period of an allowance she would be unable or virtually unable to walk for any of the reasons set out in the Regulations. We confirm the decision of the Medical Board".

The reference to "cajoling" and to the decision in R(M) 1/83 (a decision of a Tribunal of Commissioners) is clearly a reference to paragraph 25 of that decision. In that paragraph the Tribunal of Commissioners said this:-

"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."

The reference to regulation (3)(1)(b) is of course to the regulation so numbered which I have set out.

7. As appears from Decision R(M) 3/86 at paragraph 8, the first question as to mobility allowance is whether in fact the requirements of any of the paragraphs of regulation 3(1)(a)(b) or (c) is satisfied; the second question is one of causation, namely whether (within the opening paragraph of regulation (3)(1)) the circumstance of being unable

to walk or virtually unable to walk is through the physical condition of the person concerned as a whole. Unless this distinction as to the two questions is borne in mind, confusion (and in particular confusion in the use and analysis of authorities in this jurisdiction) is liable to result.

8. In the Lees case the person concerned was completely blind and she suffered from some hydrocephalus with symptoms including impairment of balance and impairment of capacity for spacial orientation; outdoor walking was only possible with the help of an adult guide to pilot her. In my judgment it appears clearly from the opinion of Lord Scarman at p. 935 A-D that the subject matter of regulation 3 is the ability to move on foot ("locomotion"), the physical aspects of walking, not the power or lack of ability to direct one's movements towards a desired destination. As Lord Scarman said at p. 936 -

> "A blind person by reason of his blindness may need a guide: but he does not, merely because he is blind, need enhanced facilities for locomotion."

Lord Scarman also stated that paragraphs (3)(b) and (c) are directed towards limitations upon a person's physical capacity to move himself on foot - see p.936 C-D. I agree with Miss Rowe that the distinction made by Lord Scarman is the crucial distinction. It follows accordingly that the reference in paragraph 25 of Decision R(M) 1/83 to it being proper to take account of the fact that a major purpose of walking is to get to a designated place is bad law, and with respect I agree with the Tribunal of Commissioners in Decision R(M) 3/86 where they reached (in substance) the same conclusion.

9. Accordingly in my judgment the medical appeal tribunal in the present case has in part based itself upon a proposition which has subsequently been shown to be bad law, and it is for that reason that I consider that the appeal must be allowed.

10. It was submitted to me in the written observations on behalf of the Secretary of State that the needs of Geraldine for guidance, control or cajoling were "unrelated" to capacity to perform the physical act of walking. In my judgment this is far too sweeping. I consider that there are dangers in approaching the first question which I have identified above on the basis of ruling out ab initio some evidential features because of the label attached to them. Certainly the House of Lords in identifying that the first question concerned the facility for locomotion said no such thing, and in particular was not purporting to delimit the admissible evidence as to the manner of walking in regulation 3(1)(b). The questions raised are questions of degree - see Baron v. Secretary of State for Social Services (unreported) in the Court of Appeal on 17 March 1986 per May LJ at pp.6G and 7F-H of the transcript. So far as these matters may lead to an inference as to (relevantly) whether there is or is not virtual inability to walk I see no reason to rule them out ab initio. The weight to be attached to any factor is for the expert medical appeal tribunal.

11. I in particular do not accept Miss Rowe's submission that the capacity to form the decision to walk is, as a generality, irrelevant. This appears to me to be a feature which can properly be taken into account if the tribunal considers it material in the particular case, but again the weight if any to be attached to it is for the medical appeal tribunal. The House of Lords did not in the Lees case in my judgment purport to treat the mental element as irrelevant per se on the first question.

12. With regard to the second question, that of causation, I respectfully agree with the Tribunal of Commissioners in R(M) 3/86 at paragraph 7 that the decision of the then Chief Commissioner in R(M) 2/78 is unaffected by what the House of Lords decided in the Lees case. In that case it is clear that the Chief Commissioner (at paragraphs 17 and 18) was concerned not with the first question but with the second question, the question of causation. As to that he said (in paragraph 17):-

> "No doubt it was open to the medical appeal tribunal to have decided that what

effectively prevented Robert from exercising any physical ability to walk was attributable to a mental state, stemming from but operating independently of any disabling physical condition".

The Tribunal of Commissioners in paragraph 8 of its decision R(M) 3/86 considered the distinction between could not walk and would not walk, but they were not in my view saying anything different from the Chief Commissioner in the passage cited. They were certainly not saying I consider that whenever 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. The Tribunal of Commissioners, having stated that the criterion was whether the claimant could not walk as distinct from would not walk, set out an example of a "would not walk" case, being one where the child -

"was making a conscious choice, and on no footing could his refusal to walk be identified with a physical disablement."

The Tribunal of Commissioners then went on to say:-

"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 was giving an example of a clear case of conscious choice, not laying down that if, and whatever the circumstances in any other case, re-starting was possible by persuasion or cajoling (of whatever nature) then the causation could not be physical. The matter remains one of fact and degree for the expert medical appeal tribunal and I do not read the Tribunal of Commissioners as saying otherwise, particularly in view of the last sentence which I have quoted above.

13. There is a further point with which I should deal. Miss Robertson submitted that, in relation to regulation (3)(1)(b), what was imposed was a statutory test of independent walking ability using artificial aids. This I think is too sweeping and is inconsistent with Lees, because in one sense of being independent Miss Lees (being blind) could not walk but in the sense of having the capacity of locomotion she could. Also, I do not consider that the medical appeal tribunal is required only to see a person walking without any assistance of any kind or indeed actually to conduct the test out of doors; the nature and place of the walking test which is carried out must be within the discretion of the tribunal. What is however critical are the inferences to be drawn from the test carried out as to walking ability out of doors, so far as regulation (3)(1)(b) is concerned.

14. There are I think dangers in paraphrasing the regulatory criteria, just as in categorising certain features by way of ruling in or ruling out a claim per se. No doubt different medical appeal tribunals may arrive at different conclusions on different cases which appear (at least to a layman) to be indistinguishable; this is a feature which tends inevitably to follow the application of general words to particular cases by different expert tribunals. However, it does not in my judgment justify subjecting the regulation to the gloss of either paraphrase or the pre-emptive descriptive categorization of evidential material.

15. My decision is as in paragraph 1.

(Signed) Judge Bromley QC
Chief Commissioner

Date: 20 January 1987