

CN 17/1982

RFMH/FB

SOCIAL SECURITY ACTS 1975 TO 1982

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

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Name: Mrs Penelope Ann Croft on behalf of Martin Oliver Croft

Medical Appeal Tribunal: London South

Original Decision Case No: LS 653/81

ORAL HEARING

1. My decision is that the decision of the medical appeal tribunal given on 8 June 1981 was erroneous in point of law, and accordingly I set it aside. The case is remitted to a differently constituted medical appeal tribunal for rehearing and decision.

2. This is an appeal by the claimant, on behalf of her son Martin. She was represented at the hearing before me on 10 May 1983 by Mr J Douglas, Solicitor, of the Child Poverty Action Group. The Secretary of State was represented by Mr P Milledge of the Solicitor's Office of the Department of Health and Social Security.

3. Martin was born on 27 February 1975. He is able to walk but is handicapped from making proper use of his capacity to the full because he suffers from Down's Syndrome and is mentally impaired and hyper-active. The claimant claimed a mobility allowance on 14 January 1980, but on 25 April 1980 a medical practitioner to whom the medical question had been referred, and a medical board on 30 July 1980, concluded that the medical conditions for award of benefit had not been satisfied. The claimant then appealed to the medical appeal tribunal.

4. In a written submission to the medical appeal tribunal dated 17 December 1980 the Secretary of State's representative brought to the medical appeal tribunal's attention the detailed provisions of section 37A(1) of the Social Security Act 1975 and of regulation 3 of the Mobility Allowance Regulations 1975.

5. On 8 June 1981 the medical appeal tribunal confirmed the decision of the medical board, giving its reasons for the decision -

"We have heard the parties and considered the evidence. We have seen Martin walk. Whilst we accept he needs constant attention and supervision (and for this attendance allowance is in payment) he can walk."

The claimant applied to the medical appeal tribunal for leave to appeal to the Commissioner on a question of law.

6. On 28 October 1981 the medical appeal tribunal granted to the claimant leave to appeal to the Commissioner for the following reasons:-

"There is an arguable point of law.

We do not think it necessary for the Tribunal to consider the separate questions set out in regulation 3(1)(b) of the Mobility Allowance Regulations. However, no reference is made in the decision to this paragraph of regulation 3(1) which had been the subject of the submission to the Tribunal by the claimant. Moreover, although the Tribunal made a finding of fact, viz Martin can walk, it made no findings of fact on the matters referred to in the printed form."

7. Regulation 23(1) of the Social Security (Determination of Claims and Questions) Regulations 1975 provides as follows:-

"23. (1) 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 the members of the tribunal, a statement of the reasons for their decision, including their findings on all questions of fact material to the decision."

It is, of course, a fundamental principle that if a medical appeal tribunal gives inadequate reasons for its decision, that is an error of law, whether or not the actual decision is correct - see Commissioner's Decision R(A) 1/72 (paragraph 8). In my judgment, the medical appeal tribunal in this case did not fully comply with regulation 23(1). I should put on record at this stage that the Secretary of State's representative now concerned supports the appeal. In Decision R(M) 1/83 (paragraph 9) a Tribunal of Commissioners stated -

"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. ... 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."

8. The relevant statutory provisions are contained in regulation 3 of the Mobility Allowance Regulations 1975 as amended, of which paragraph (1) reads as follows:-

3 - (1) A person shall only be treated, for the purposes of section 37A of the Social Security Act 1975, 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."

9. In Decision R(M) 1/83 the Tribunal of Commissioners held that a person may be found not to be unable to walk within the terms of sub-paragraph (a) above notwithstanding that he is unable to walk without assistance and added (paragraph 14) "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." The examining medical practitioner reported that Martin suffered from Down's Syndrome which was responsible for his lack of walking ability. He noted that although Martin walked well he often refused to do so.

10. The claimant submitted further documentary evidence to the medical board. In a letter dated 5 June 1980 Professor J W Scopes, Professor of Paediatrics at St Thomas' Hospital, stated "I confirm that Martin is a patient under this hospital. From birth it has been known that he has Down's Syndrome and congenital heart disease. He has further suffered from episodes of unconsciousness which could be breath-holding attacks, but could also be related to his heart disease. Although he is able to walk, he has no idea of danger and could wander into traffic or other dangerous situations. He is thus a retarded child who requires continuous looking after" In a letter dated 16 June 1980, Martin's school reported: "Martin is a happy and active child, but he gets tired very quickly. When out, he walks for about five minutes before becoming breathless and unable to walk any further. It is necessary for him to ride in a buggy. When we go out on a class outing we have to take a buggy for Martin, as physically he is unable to cope with the walking." The medical board reported that Martin walked well in the house but suffered from a pulmonary systolic murmur.

11. In the present case it is not contended that the claimant is unable to walk within the terms of sub-paragraph (a) above, but his ability to do so 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 is able to make progress on foot without severe discomfort, that he is virtually unable to walk within the terms of sub-paragraph (b) above. It is not contended that the exertion required to walk would constitute a danger to Martin's life or would be likely to lead to a serious deterioration in his health within the terms of sub-paragraph (c). Although it is for the medical authorities to determine in the light of the evidence whether the claimant is virtually unable to walk, the statement of findings on all relevant matters raised expressly or by necessary implication is essential.

12. The claimant submitted further medical evidence in support of the appeal to the medical appeal tribunal. In a letter dated 21 October 1980, Martin's doctor stated "The above Martin suffers from severe (1) Down's Syndrome, D.Q.40 (2) pulmonary hypertension (3) cyanotic heart diseases (4) urinary and faecal incontinence (5) hyperactivity. As a result of the combination of these defects, Martin is virtually unable to walk any distance without constant control and help ..." In another doctor's letter it was reported "Martin is a Down's Syndrome child with heart involvement and pulmonary hypertension (Eisenmenger syndrome). He is under care of Professor Scopes (St Thomas' Hospital) he is incontinent. His pulmonary condition is progressive, he gets very tired, has mild cyanosis ..." The claimant gave evidence and contended that although Martin was physically able to walk he was only able to do so for limited distances and had a tendency to go off on his own so that he needed constant supervision.

13. It is clear from the evidence submitted on behalf of Martin that his inability to move from one place to another as desired is caused by a tendency to walk erratically 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. 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. In Decision R(M) 1/83 the Tribunal of Commissioners held (paragraph 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 .. to be taken into account in addition."

It was further held that the term "severe discomfort" in regulation 3(1)(b) related to matters like pain and breathlessness that could be brought on by walking but did not extend to an autistic child or the refusal to walk of a child suffering from Down's Syndrome as these were the consequences of resistance to the idea of walking rather than of walking itself.

14. Clearly the medical appeal tribunal failed to deal with the details of regulation 3(1) of the Mobility Allowance Regulations and made no findings of fact. The reason for their decision "we have heard the parties and considered the evidence. We have seen Martin walk. Whilst accepting his constant attention and supervision he can walk", gives no indication on what grounds the medical appeal tribunal arrived at their conclusion. It is important that the primary facts that are in dispute should be found and not just the conclusion drawn from them. Where it is contended, as in the present case, that behavioural inhibitions on walking are due to fits and an unreasonable refusal to walk, it should be recorded whether these occur frequently or only occasionally and if possible how often. It is also contended that Martin can make progress on foot for a limited distance and accordingly a finding of the relevant distance should have been made. Furthermore the medical appeal tribunal failed to indicate their reasons for rejecting the medical evidence submitted by the claimant. The parties to an appeal before a medical appeal tribunal should be able to tell from the decision itself what were the tribunal's findings of fact on each of a factual test in regulation 3(1).

15. Accordingly I hold the decision of the medical appeal tribunal of 6 June 1981 was erroneous in law and I set aside its decision. I remit the appeal to a differently constituted medical appeal tribunal for rehearing and for a new decision.

16. The claimant's appeal is allowed.

(Signed) R F M Heggs
Commissioner

Date 29 June 1983

Commissioner's File: C.M. 17/1982
DHSS File: B.51023/364