Mobility Allowance — DAC: Duty to Refer Claim

CAS

12/95

PLH/1/LM

Commissioner's File: CM/20/94

SOCIAL SECURITY ACTS 1975 TO 1990
SOCIAL SECURITY ADMINISTRATION ACT 1992

CLAIM FOR MOBILITY ALLOWANCE

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. For the reasons given below I hold the decision of the disability appeal tribunal on 17 February 1993 confirming the rejection of this renewal claim for mobility allowance to be erroneous in law. The decision must be set aside and the case referred to a different tribunal for redetermination.

2. The claimant is a skilled stonemason now aged 50. He lost the lower part of his right leg in an accident some years ago and claimed mobility allowance in 1991, having by that time had to give up work because he was unable to clamber around on site. He was awarded mobility allowance for a limited period following a medical examination on 4 April 1991 at which he was observed to walk some 40 yards with the aid of a stick. His claim for the allowance to be renewed for a further period was rejected after a second medical examination on 4 February 1992 at which he was observed to walk a total of 100 paces on crutches. The claimant had reported trouble and pain in his opposite hip and spine as his first artificial limb had been too long. Degenerative disease of the lower spine and left hip joint was diagnosed as impairing his walking ability, in addition to the amputation.

3. He appealed against the rejection on the ground that his walking ability had in fact got worse since he was originally awarded the allowance, so that he now needed crutches instead of a stick. A report obtained from his GP confirmed that he had arthritis of the hip and spine, with reduced mobility because of the abnormal stresses placed on these joints over the years, but estimated his walking ability at 500 yards. The present appeal, brought with the leave of the Commissioner granted on 21 February 1994, is against the decision of the disability appeal tribunal on 17 February 1993 confirming the rejection of his claim on the ground that he was neither unable nor virtually unable to walk and so did not meet the conditions for mobility allowance.

4. For a disabled person to qualify for mobility allowance (or now the higher rate mobility component of disability living allowance) the adjudicating authorities must be satisfied that

he or she is unable to walk or virtually unable to do so, even with the use of suitable aids. Inability or "virtual" inability to walk is to be tested according to the factors set out in what is now regulation 12(1)(a) Disability Living Allowance Regulations 1991 S.I. No. 2890. It is to be noted that each of the doctors who examined the claimant in 1991 and 1992 gave it as his opinion that the claimant's walking ability was so restricted as to meet this standard and would continue to be so for 12 months after the date of the examination, although the first doctor commented that the claimant was possibly being given the benefit of the doubt and the second thought his condition would improve. The condition that has to be satisfied is explained in R(M) 1/91 paragraph 6: the base point is a total inability to walk, which is extended to take in people who can technically walk but only to an insignificant extent.

5. Under regulation 24 Social Security (Introduction of Disability Living Allowance) Regulations 1991 S.I. No. 2891, medical questions in relation to mobility allowance which would formerly have had to be determined by a medical board or medical appeal tribunal have become subject to the system of adjudication introduced for disability living allowance, so that the claimant's appeal fell to be decided by a disability appeal tribunal. This did not alter the main statutory question to be decided in his case but it did mean that unlike a medical appeal tribunal which was a specialist body able to carry out its own examination of the claimant's walking ability, the disability appeal tribunal (which is not an expert medical body although one member is medically qualified) was required to make the decision on the evidence presented to it, being precluded by section 55(2) Social Security Administration Act 1992 from conducting its own test or examination. I shall have to return to the importance of this difference later.

6. The claimant appeals on the grounds set out in his notice of appeal submitted on 21 October 1993 that the tribunal had erred in law in not giving specific reasons for the non-renewal of an existing award of benefit (as required for attendance allowance by decisions R(A) 2,83, R(A) 1/84 and R(A) 1/89 which he suggests are equally applicable) and in not giving any explanation of why his own evidence that his walking ability was much less than suggested in the medical reports had been rejected. In a helpful and objective submission dated 26 May 1994 the adjudication officer supports the appeal on the second ground, pointing out also that the tribunal have failed to make any findings of fact on the material issue of how far the claimant can walk without pain or severe discomfort, and in this and other respects have not shown that they correctly addressed the various points they were required to consider by regulation 12 of the DLA regulations cited above. Accordingly he submits that the tribunal have not complied with their duty under regulation 26E(5) Social Security (Adjudication) Regulations 1986 S.I. No. 2218 to give and record reasons and material findings of fact.

7. In my judgment these submissions by the adjudication

officer, and the claimant's contentions on his second ground of appeal, are well founded. The tribunal's record of their "reasons for decision" amounted to no more than a statement that they were satisfied the claimant was not unable or virtually unable to walk and so did not fulfil the conditions for mobility allowance. This was a statement of a conclusion, rather than an explanation of the reasons which led them to it, and so insufficient to satisfy regulation 26E(5). The failure to make and record clear findings of fact on the claimant's ability to walk without pain or severe discomfort, or to show that specific account had been taken of the various factors required to be considered under regulation 12(1)(a) of the DLA regulations (limitation as to distance, speed, time or manner of making progress on foot, etc.) amounted to further errors in law so that the decision has to be set aside.

8. This makes it unnecessary for me to determine whether the tribunal's failure to mention specifically the fact that the claimant had previously been receiving mobility allowance, or to comment on why they were taking a different course from the earlier decision to award it, was a further ground for setting the decision aside. I must however deal with this issue and the duty of a disability appeal tribunal on a renewal claim, in order to give directions to the new tribunal which will now have to reconsider the case. The claimant, as noted above, submits that the tribunal is bound to give reasons for departing from the previous award by analogy with the principle adopted in many reported decisions on claims for renewal of attendance allowance: see, e.g. R(A) 2/83 paragraph 5; R(A) 1/84 paragraph 9; R(A) 1/89 paragraphs 5-9; R(A) 2/89 paragraph 3; R(A) 3/90 paragraph 18. The adjudication officer on the other hand submits that regulation 26E(5) of the Adjudication Regulations only requires the tribunal to give reasons for their own decision, and does not oblige them to give explicit reasons why their opinion differed from that of the adjudicating authorities deciding the earlier claim to mobility allowance.

9. There have been numerous decisions on the duty of a medical appeal tribunal to give reasons for rejecting renewal claims on the expiry of a previous award of mobility allowance. Unhappily they do not all speak with one voice. In CM 205/88 (unreported, *23/89) a Tribunal of Commissioners held that it was an error of law not to specify reasons for the non-renewal, as the Attendance Allowance Board were required to do in the cases cited in paragraph 8 above. In CM 044/91 (*67/91; to be reported R(M) 2/94) the Commissioner declined to follow this decision, which he held inconsistent with two Court of Appeal cases (Braithwaite v Secretary of State, unrep. C.A. 3 July 1986, and R v National Insurance Comr. ex p. Viscusi [1974] 1 WLR 646) to the effect that if the reasons for the later decision were made clear it was not necessary to make any comment on the previous one, or to spell out further the reasons for taking a different course. In CSM 91/90 (*16/92) the Commissioner considered both CM 205/88 and CM 44/91 and held that on the facts before him (a claimant with a progressively deteriorating condition) there was a duty to explain why the claimant was no longer considered

entitled to the allowance on a renewal claim. In CM 108/90 (*3/94) the Commissioner took the same course as in CM 044/91, expressing the view that CM 205/88 had been decided per incuriam, facts and evidence relating to the period of an earlier award were irrelevant to what the tribunal had to decide on a renewal claim, and the tribunal as an expert medical body was in any case under no obligation to explain why they accepted or rejected particular evidence or reached a particular conclusion on a purely medical question.

10. Case CM 044/91 was then considered by the Court of Appeal, together with three other cases raising questions on the extent of the duty of medical appeal tribunals to give reasons for their decisions: (Evans, Kitchen & Others v Secretary of State, unrep. C.A. 30 July 1993). All of the appeals were allowed and in the course of giving guidelines for future cases on medical adjudication the Court of Appeal held that the tribunal record should show to what medical issues they had addressed themselves, and demonstrate the reasons why they had reached a particular conclusion. If this was not obvious from their findings, a short explanation should be given, particularly where a diagnosis is made which differs from a reasoned diagnosis reached earlier by another qualified practitioner, or (as in the Viscusi case) a question of causation is being decided against a claimant after an earlier decision on a similar question in his favour. The appeal in case CM 044/91 (Begum) was allowed on the ground that the written record failed to show that the tribunal had considered all the questions the Mobility Allowance Regulations required them to address, for example by not dealing with the dates to which the findings were related: see transcript p 29 B-E. But the same passage makes plain that had this been done the decision would have been "unassailable" and that the findings of fact made it sufficiently plain why the tribunal had concluded that on the date of the examination the claimant was not "virtually unable to walk". The only possible reading of that passage, in my view, is that there was no necessity for the tribunal to spell out further why they were differing from the previous decision awarding benefit, this being sufficiently plain from their own findings.

11. Since that decision, a further appeal by the claimant in case CM 108/90 has I understand been allowed by the Court of Appeal by consent (21 June 1994) but without any indication of whether this was on the issue of the medical appeal tribunal's duty to give reasons for rejecting particular medical evidence or that of specific reasons for non-renewal of a previous award. The latter question has again been considered by another Commissioner in two recent decisions, CM 140/92 and CM 113/91 (*69/93 and *69/94: both unreported) where he held that what was said in case CM 205/88 was not inconsistent with any of the three Court of Appeal decisions referred to above and should be followed, with the "need for or desirability of consistency" with a previous award having to be considered by the tribunal as an issue on most, if not all, cases on a renewal claim.

12. It is not necessary for me to express a view on this question as it affects medical appeal tribunals, and I do not propose to do so. It seems to me that a fresh look has to be taken at the extent of the duty to give reasons for rejection of renewal claims in both attendance and mobility cases now that attendance allowance for the under-65's and mobility allowance have both been subsumed into disability living allowance under what is now section 71 Social Security Contributions and Benefits Act 1992, and all appeals on the qualifying conditions for attendance allowance and disability living allowance come before disability appeal tribunals under section 33 Social Security Administration Act 1992 and regulation 26C of the Adjudication Regulations. Any distinction made in the cases depending on the specialist nature of medical appeal tribunals cannot apply to a disability appeal tribunal which is not an expert medical body, (CM 406/92, to be reported as R(M) 1/93); and it would be absurd if the requirements for giving reasons differed between components of the same benefit dealt with by the same tribunal. Parliament could not possibly have intended such a result under the wording of regulation 26E(5) of the Adjudication Regulations which must apply alike to all determinations of a disability appeal tribunal.

13. Four points are I think incontrovertible. First, there is a general requirement on the tribunal to set out reasons and material findings of fact in the written record of their decision to enable it to be seen that they have applied their minds to the right questions and dealt with them on the basis of the right law and proper findings of fact, within the powers conferred on them by the legislation. See R v Immigration Appeal Tribunal ex p. Khan, [1983] QB 790, 794; R v Civil Service Appeal Board ex p. Cunningham [1992] ICR 816 at 827; Evans, Kitchen & Ors v Secretary of State (transcript p 24A-E, 27C-E). Second, the requirement to give reasons imports (for an adverse decision) a requirement to do so in sufficient detail and with sufficient clarity to enable a claimant or his or her representative to understand why the result has gone against them, and why specific contentions or evidence on a material point have been rejected: see, e.g., R(A) 1/72 paragraph 8, R(I) 18/61 paragraph 13, R(M) 1/83 paragraph 9. Third, the requirement applies to questions of medical fact and opinion no less than to other issues, although it does not require the writing of an elaborate treatise to explain medical matters: R(I) 18/61 supra; Evans, Kitchen & Others, transcript p. 27A-29A, 29G-30G. The claimant and his representative must thus be regarded for this purpose as possessed of a reasonable understanding and a medical dictionary, so findings and reasons on medical questions may be stated succinctly, in accurate medical language. Fourth, on a renewal claim, which is a fresh claim for benefit for a period not covered by any previous award, there can be no question of the tribunal being bound to follow any previous decision awarding benefit for an earlier period; nor, in determining whether the conditions for benefit are satisfied on the facts as they find them to be at the date relevant for their decision, is any different standard to be applied according to whether benefit has or has not been awarded before: ex p. Viscusi, supra; CM 205/88

paragraph 13 (not doubted on this point in the later cases).
14. I do not for my part find it consistent with this fourth point that there should be any kind of "bias" in the claimant's favour on a renewal claim arising out of the fact that a decision has been made in his favour before. It remains in all cases for the tribunal to be affirmatively satisfied on the material before it that the conditions for entitlement are met, taking into account always that they are conducting an inquiry to ascertain the claimant's true entitlement, and not merely umpiring a dispute where a formal "burden of proof" is placed on one side or the other: cf. Viscusi, p 651D-652F, 654E, 659C. To introduce such a bias could perpetuate error, and in its turn introduce inconsistency in the treatment of different claimants on otherwise similar facts where one had the benefit of a previous award and the other did not. I therefore do not consider the idea of a tribunal having to deal with "the need for consistency" as a separate issue in its own right on a renewal appeal to be well founded. The need to treat like facts alike is of course a basic underlying requirement of any just adjudication process but this does not mean it has to be addressed specifically as an "issue" between the parties any more than the need for fairness, of which it is just one aspect. I do not read anything said in R(A) 2/83, CM 205/88 or Evans, Kitchen & Others as suggesting otherwise; and insofar as the two recent decisions in CM 140/92 and CM 113/91 seek to go further, I decline to follow them.

15. It does however seem to me to follow from what is said by the Court of Appeal in Evans, Kitchen & Others that while a previous award carries no entitlement to preferential treatment on a renewal claim for a continuing condition, the need to give reasons to explain the outcome of the case to the claimant means either that it must be reasonably obvious from the tribunal's findings why they are not renewing the previous award, or that some brief explanation must be given for what the claimant will otherwise perceive as unfair. This is particularly so where (as in the present and no doubt many other cases) the claimant points to the existence of his previous award and contends that his condition has remained the same, or worsened, since it was decided he met the conditions for benefit. An adverse decision without understandable reasons in such circumstances is bound to lead to a feeling of injustice, and while tribunals may of course take different views on the effects of primary evidence, or reach different conclusions on the basis of further or more up to date evidence without being in error of law, I do not think it is imposing too great a burden on them to make sure that the reason for an apparent variation in the treatment of similar relevant facts appears from the record of their decision.

16. Relating this to attendance or mobility cases, if a tribunal, in a decision otherwise complying with the requirements as to giving reasons and dealing with all relevant issues and contentions, records findings of fact on the basis of which it plainly appears that the conditions for benefit are no longer satisfied (e.g. a substantial reduction in attendance needs following a successful hip operation, or the claimant being

observed to walk without discomfort for a long distance) then in my judgment it is no error of law for them to omit specific comment on any decision awarding benefit for an earlier period. Their reason for a different decision is obvious from their finding. In cases where the reason does not appear obviously from the findings and reasons given for the actual conclusion reached, a short explanation should be given to show that the fact of the earlier award has been taken into account and that the tribunal have addressed their minds for example to any express or implied contention by the claimant that his condition is worse, or no better, than when he formerly qualified for benefit. Merely to state a conclusion inconsistent with a previous decision, such as that the tribunal found the claimant "not virtually unable to walk" without stating the basis on which this conclusion was reached, should not be regarded as a sufficient explanation, and if the reason for differing from the previous decision does not appear or cannot be inferred with reasonable clarity from the tribunal's record, it will normally follow in my view that they will be in breach of regulation 26E(5) and in error of law.

17. In the present case the tribunal did in my view make it reasonably clear in their third finding of fact about the amount of walking done by the claimant at his second medical examination why they were reaching a conclusion on his walking ability which differed from that on which the earlier award of benefit had been based. However their findings and reasoning were deficient in the other respects identified above, and for the reasons I have given I set aside their decision dated 17 February 1993 as erroneous in law, and refer the case in accordance with sections 23(7) and 34(4) of the Administration Act to a differently constituted disability appeal tribunal which I direct to redetermine all relevant questions in accordance with the principles set out above.

18. The appeal is allowed and the case referred accordingly.

(Signed) P L Howell
Commissioner

Date: 30 January 1995