

SOCIAL SECURITY ACTS 1975 TO 1984

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

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Name: Anthony W on behalf of Claire Marie W (CHILD)

Medical Appeal Tribunal: Leeds

Original Decision Case No: 23610/84

1. In this appeal the claimant is a young girl, Claire, who was born on 25 October 1973. Her father has been appointed by the Secretary of State to act upon her behalf. With my leave, she appeals against a decision of the medical appeal tribunal dated 25 July 1984 which confirmed a decision of a medical board dated 26 September 1983. With characteristic objectivity the Secretary of State supports the claimant's appeal. I can, accordingly, be brief.

2. Claire suffers from asthma which a paediatrician has, in the papers, described as "serious and severe". That paediatrician considers that Claire should have constant access to a nebuliser. In a letter dated 13 September 1983 he said that Claire had been admitted to hospital 5 times in the last 12 months. He added:

"Asthma attacks can be provoked by exercise (see above). Although most asthma attacks are not life threatening, they may certainly have a serious affect on health and wellbeing if they are recurrent and severe."

3. On 11 February 1983 a claim for mobility allowance was made on behalf of Claire. The medical practitioner to whom the insurance (now the adjudication) officer referred the medical question arising on the claim was of the opinion that Claire was neither unable to walk nor virtually unable to walk. On appeal, a medical board took the same view. The claimant's case was then carried to the medical appeal tribunal.

4. On 25 July 1984 the medical appeal tribunal confirmed the decision of the medical board. I quote from the findings and reasons of the medical appeal tribunal:

"We saw her walk a distance of 50 yards along the indoor corridor talking throughout without evidence of breathlessness. Physical examination before the test showed the presence of occasional intermittent soft wheezes. In her statement to the Medical Board the claimant stated that she could walk 200 yards without obvious distress it is not within our clinical experience that exertion would lead to a serious deterioration in her health. If it produces intermittent exacerbation she will recover. We consider that the regulation refers to a deterioration in health persisting for at least 12 months We consider that the distance she can walk without severe discomfort is 200 yards as agreed by the parents and does not fulfil this requirement."

5. There is, of course, an obvious misdirection in the foregoing. Regulation 3(1)(c) of the Mobility Allowance Regulations 1975 reads -

"(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."

There is nothing either in that sub-paragraph or anywhere else in the Regulations to suggest that "serious deterioration" in a claimant's health must persist for at least 12 months before it can be taken into account. That misdirection amounts to vitiating error of law.

6. I add only this. I accept the submission of the Secretary of State to the effect that account cannot properly be taken of any restrictions which the need to carry the nebuliser placed upon Claire's walking capacity. In the recently reported case of Lees v Secretary of State for Social Services [1985] 2 WLR 805, the House of Lords held that a blind and spatially disorientated girl, who could not walk out of doors without an adult to pilot her, was neither unable to walk nor virtually unable to walk. Her disability, they found, reflected not an inability to walk but an inability to make proper use of the faculty of walking. That case is not, of course, on all fours with the case now before me. It does suggest to me, however, that Claire cannot be held to satisfy the prescribed criteria merely on the grounds that she has to be accompanied by an adult who carries the nebuliser. I have stressed the word "merely". This aspect of the case in no way detracts from the need to give proper consideration to the issue of whether the exertion required to walk constitutes a danger to Claire's life or is likely to lead to a serious deterioration in her health.

7. My decision is that the decision of the medical appeal tribunal dated 25 July 1984 is erroneous in point of law and is set aside. The matter will now go back for reconsideration and determination by a differently constituted medical appeal tribunal.

(Signed) J. Mitchell
Commissioner

Date: 26th July 1985.

(over)