CM 33/1980

IEJ/BDS

SOCIAL SECURITY ACTS 1975 TO 1980

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

DECISION OF THE SOCIAL SECURITY COMMISSIONER

[ORAL HEARING]

Decision C.M. 2/81

1. This is an appeal on a point of law from a decision dated 18 December 1979 of the London West Medical Appeal Tribunal and is brought pursuant to a Commissioner's leave granted on 30 September 1980.

The appeal is allowed and I set aside the Tribunal's decision accordingly.

My decision follows an oral hearing on 6 February 1981 at which the mother of the claimant, acting on his behalf, was represented by Mr Richard Drabble, of counsel, instructed by Mr John Douglas, Solicitor (Child Poverty Action Group) and Mr J P Canlin, Solicitor's Office, Department of Health and Social Security, represented the Secretary of State.

I am much indebted to both Mr Drabble and Mr Canlin for their assistance. They were in fact at one in seeking to have the appeal allowed; but as it was his client's appeal, Mr Drabble has borne the brunt of satisfying me by able argument that I should allow it.

2. Since the appeal turns upon a single point of construction of a material regulation I need refer only briefly to the facts of the case.

The material claim is for mobility allowance for a male child, G, rising 15 years of age at the date (9 April 1979) when the claim was first received by the Department, whose main affliction is gross mental retardation since birth. It is not in dispute that mobility allowance is, in general terms, a benefit provided for persons with severe locomotion difficulty arising from physical disablement who are able to benefit from enhanced facilities for locomotion.

3. (1) Under section 37A of the Social Security Act 1975 (inserted by the Social Security Pensions Act 1975), and subject to the provisions of that section, a person who satisfies prescribed conditions as to residence or presence in Great Britain - and nothing turns on those requirements upon this appeal - is to be entitled to 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".

(2) Under sub-section (2) of section 37A it is provided that:

"Regulations may prescribe the circumstances in which a person is or is not to be treated for the purposes of this section as suffering from such physical disablement as is mentioned above; but a person qualifies for the allowance only if -

(a) his inability 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."

Nothing in this appeal turns upon either (a) or (b) so set out, and it is accepted on all sides that the power to make regulations which is so conferred can be exercised both so as to enlarge and so as to restrict the scope of what would otherwise rank as inability or virtual inability to walk.

(3) Regulations made under that sub-section - The Mobility Allowance Regulations 1975 - were first made with effect from 1 October 1975 and continued in force without material amendment down to 20 March 1979, but these were amended with effect from 21 March 1979 (ie before this claimant's claim was received) by the Mobility Allowance Amendment Regulations 1979.

(4) As so amended, regulation 3 (which is the only regulation material to the issue on this appeal) reads as follows:-

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.

4. (1) The drafting structure of regulation 3 is of some complexity, but the general effect of it is not open to doubt and can be paraphrased thus:

(i) the provisions of regulation 3(1) can be overridden by matters attracting the operation of regulation 3(2);

(but regulation 3(2) does not in fact bear in the present case)

(ii) regulation 3(1) deals, broadly, with three situations namely:

(a) actual (ie total) inability to walk

(b) "virtual" inability to walk

(c) cases where the exertion required to walk would constitute a danger to life or health.

(but neither (a) nor (c) is in point in the present case)

(iii) certain further limitations are made applicable to all three situations and are contained in the wording "if his physical condition ..... nature of employment - "

(but no issue arises on these in the present case)

(iv) additional limitations are applicable under head (b). First, the relevant ability to walk is to be ability to walk out of doors, and secondly the limitation of ability is to be in one (or, by necessary inference, more than one) of certain specified respects.

And the whole issue on this appeal turns upon the proper construction of that second limitation.

(1) The Tribunal's stated findings and reason for decision were expressed as follows:-

"We have considered the whole of the written and oral evidence in this case and the submissions of the parties. We have seen the child walking in the corridor. He walks, with a swaying gait but proceeds reasonably well and without apparent discomfort.

We are satisfied that his inability to behave normally is due to a physical condition ie changes in the cerebral cortex which are progressive. He is not unable or virtually unable to walk within the meaning of the 1975 Regulations.

We turn now to the 1979 Regulations and in particular 3(1)(b). We consider that his outdoor mobility is limited as set out in that Regulation. However it is not so limited on account of severe discomfort which latter words we consider to govern those which go before. We therefore do not consider that he qualifies for the allowance within the meaning of either set of Regulations."

(2) It was accepted by both parties before me (and in my judgment rightly) that the references in that statement to the 1975 regulations were to the regulations as in force prior to the amendment in 1979 to which I have already referred and that as such they are in correct analysis surplusage, since the amended regulations were already operative prior to the receipt of G's claim.

(1) It will be readily apparent from the third paragraph cited in 5(1) above that the Tribunal:

(i) must have decided as a matter of medical opinion that the claimant's ability to walk out of doors was so limited that he was virtually unable to walk, and have accepted that it was so limited as regards one or more of:

(a) the distance over which he could make progress on foot; or

(b) the speed at which he could make progress on foot; or

(c) the length of time for which he could make progress on foot; or

(d) the manner in which he could make progress on foot; but

(ii) took the view that because such limitation(s) was or were not "on account of discomfort" the claimant did not meet the requirements of the regulation.

(2) The issue before me is whether or not that decision is based upon a proper construction of the regulation.

I should here pause to recall that the terms of the regulation do not in fact include the phrase "on account of severe discomfort" - the actual wording is "without severe discomfort".

8. (1) Notwithstanding that difference in wording my own initial view was that the Tribunal had proceeded upon the correct construction and that - just as they had interpreted the provision - a claimant could qualify under it only if both:

(a) his capacity for walking was quantitatively limited, under one or more of the stipulated heads, to a sufficient degree; and

(b) that limit was brought about by reason or on account of severe discomfort.

(2) Moreover it initially appeared to me that such was the necessary and unavoidable effect of the wording in point, despite the fact that it produced the surprising result that of two claimants whose impairment in walking was of identical ultimate degree, but in one of whose circumstances the impairment was, and in the other of whose case it was not, attended and occasioned by severe discomfort, the first alone could qualify for the benefit notwithstanding that both could equally benefit from increased facilities for locomotion.

(3) In taking that initial view I was strongly influenced by the consideration that proceeding sequentially through the wording of the provision and so starting from "his ability to walk out of doors is so limited" one cannot arrive at the terminus "that he is virtually unable to walk" without travelling a route through one or other of the formulations

which can for illustration be set out thus:

"as regards the {distance over / speed at / length of time for / manner in} which he can make progress on foot without severe discomfort."

(4) Moreover it was conceded by Mr Drabble (in my judgment rightly) that the whole passage from "as regards" to "severe discomfort" must be taken to be restricting by the introduction of additional requirements any otherwise broader generality of aspects of limitation upon the ability to walk outdoors.

9. After hearing argument I am, however, now persuaded that my initial view was quite wrong and that the correct construction which I now adopt has its thrust in the reverse sense, and - happily - avoids the anomalous result to which I have above referred.

Shortly explained, the correct construction gives to the words "without severe discomfort" in context the sense of requiring that you are to look only at what are the limits (if any) of the claimant's ability to walk outdoors without severe discomfort, be the limitation(s) in point of distance, speed, length of time or manner, and ignore any extended outdoor walking accomplishment which the claimant could or might attain only with severe discomfort.

So regarded the position will be - as commonsense suggests it should be - that the criterion is that of ability to walk outdoors without discomfort, and there will be equal eligibility for two claimants of equal and sufficient limited walking ability notwithstanding that the limited ability which they have in common is in the one case unattended by any severe discomfort and that the limit is reached in the other by reason of supervening severe discomfort.

10. If that decision be correct it follows that the medical appeal tribunal decision proceeded upon an incorrect construction that their decision must be set aside as erroneous in law.

11. Mr Drabble's main argument, which I have accepted, proceeded on the footing that the wording of regulation 3(1) was unambiguous. But he had a second, or "fall back", argument which I am satisfied should succeed if my own decision on his first argument is wrong - and can be shortly summarised as follows:-

(1) If the material wording is not to be construed unequivocally in accordance with the main argument then it follows that an ambiguity exists - the wording is capable of being read in that sense or the sense in which the Tribunal read it;

(2) the sense in which the Tribunal read it leads to results repugnant to commonsense and highly unlikely of intendment.

(3) In such cases the established canon of construction is to adopt the reasonable and sensible construction: see Homes v Bradfield R.D.C. [1949] 2 K.B.1.

12. (1) Were it necessary (as in my judgment it is not) I consider that the construction in favour of which I hold could be further supported in this jurisdiction by reference to the report on the proposed amendments Cmnd 7491 made in 1979 (but prior to their enactment) by the National Insurance Advisory Committee ("N.I.A.C."), as evidencing the obvious intention of the legislature in making the amendments.

(2) In this context Mr Canlin has pointed out, additionally and helpfully, that the power to amend the mobility allowance regulations is exercisable by the Secretary of State in accordance with the "negative procedure", so that it may fairly be said that where no action is taken by either House of Parliament under that procedure after the document has been laid before it and the prescribed time limit has elapsed the to- be- attributed intention of the legislature is that legislative effect be given to what the Secretary of State has sought to have enacted.

This, it is accepted by Mr Canlin and by Mr Drabble, would not carry the argument over the hurdle that conceptually the form of words adopted in the legislation might on a proper construction fail to give effect to the Secretary of State's intention but nevertheless be so clear, as to the proper construction, that judicial effect must be given to their tenor despite obvious anomaly or evident other intendment.

But I need not, on the views I have taken above, now pursue that aspect.

(3) What the N.I.A.C. report does clearly indicate, and after express reference to - amongst other matters - the precise wording of regulation 3(1)(b) as now enacted (see paragraph 13 of Cmd 9471) as being that proposed to be enacted, is (see paragraph 15 of Cmd 9471) " ... it is the Department's view that regard should be had to all walking ability that a person is capable of without suffering severe discomfort. If the person does not suffer severe discomfort at all the extent and nature of his walking ability will be the relevant factors".

13. Since the oral hearing I have had the opportunity of reading Decision C.M. 1/81 (not reported), in paragraph 5 of which the learned Commissioner considers the construction of the amended regulation 3(1)(b) and in particular the meaning of "severe discomfort". I respectfully agree with his conclusions in the latter respect, but would, for the reasons above expressed and with the advantage of the able arguments to which I have above referred, find myself obliged to differ from his also there expressed conclusion that the description "virtually unable to walk" is by the amended regulation 3(1)(b) confined to conditions in which walking causes "severe discomfort". But happily the embarrassment of two conflicting constructions can be avoided. For the learned Commissioner who decided C.M. 1/81 has read my present decision in draft and authorises me to say that construing the regulation in that respect he did he was proceeding without hearing argument on the point, and that, having considered the arguments above expressed and my decision, he agrees with the construction I have adopted. The adoption of that construction in C.M. 1/81 would not, he stresses, have led to any different outcome in that case.

14. My decision is as stated in paragraph 1 above.

(Signed) I Edwards-Jones
Commissioner

Date: 10 March 1981

Commissioner's File: C.M. 33/1980
DHSS File: B. 51023/174