DGR/5/MD

Commissioner's File: CM/39/1984
DHSS File: B51023/698

SOCIAL SECURITY ACTS 1975 TO 1984
APPEAL FROM DECISION OF MEDICAL APPEAL TRIBUNAL ON A QUESTION OF LAW
DECISION OF A TRIBUNAL OF SOCIAL SECURITY COMMISSIONERS

Name:
Medical Appeal Tribunal:
Original Decision Case No:
Application for leave Case No:

[ORAL HEARING]

1. For the reasons hereinafter appearing, the decision of the medical appeal tribunal given on 29 September 1983 is not erroneous in point of law, and accordingly this appeal fails.

2. On a renewal form MY221, received by the Secretary of State on 22 December 1981, a claim for mobility allowance was made by Mrs. Gregory on behalf of her son, Derek. The history of that claim is set out in the submissions of the Secretary of State dated 16 August 1984, and there is no merit in a repetition of that history here. Suffice it to say that the claimant contends that the decision of the medical appeal tribunal to the effect that Derek failed to fulfil the requirements of the Mobility Allowance Regulations 1975 (as amended) was erroneous in point of law. This appeal was heard simultaneously with a further appeal on Commissioner's file CM/173/1985 before a Tribunal of Commissioners, as it raised the same questions of law. These questions have been fully examined in the other appeal, and our decision thereon is for convenience annexed hereto. Of course, the same principles apply to the present case.

3. However, whereas in the appeal on Commissioner's file CM173/1985 the decision was erroneous in point of law and had to be set aside, this is not the case in the present instance. The tribunal made the following decision:-

> "All the scheduled and additional evidence has been considered including Dr. Milford's report, Mr. Martinez's remarks and written submission. We have seen the claimant walk today for about 100 yards at about 2 mph without distress. He will need guidance when out-of-doors because of his mental state but he will not need physical assistance. It is obvious to us from what we have seen and the claimant's mother's statement that he walked here from the railway station that he can walk with guidance out-of-doors. There is no impairment of balance or inco-ordination of movements and there are only minimal behavioural limitations. We do not think that the cramps which are mainly nocturnal are relevant.
>
> We find that the claimant fails to fulfil the requirements of the Mobility Allowance Regulations 1975 (as amended) in that he is <u>not</u> unable or virutally unable to walk (as defined) and that the exertion of walking does <u>not</u> constitute a danger to his life or health."

4. Manifestly, the claimant was capable of the physical act of walking, and the only issue

was whether or not his mental state precluded him from progressing from point A to point B. The tribunal did not regard this as a material consideration, and it is shown from the decision of the House of Lords in Lees v. The Secretary of State for Social Services [1985] 1 AC 930 that they were right. Having found as a fact that the child could walk 100 yards at about 2 miles per hour without distress and with no impairment of balance or inco-ordination, they were entitled to reach the conclusion that he did not satisfy the medical conditions for an award of mobility allowance.

5. Accordingly, we dismiss this appeal.

(Signed) E.R. Bowen
Commissioner

(Signed) D.G. Rice
Commissioner

(Signed) R.F.M. Heggs
Commissioner

Date: 12th March 1986

29/86

DGR/MD/4

Commissioner's File: CM/173/1985
DHSS File: B 51023/985

SOCIAL SECURITY ACTS 1975 TO 1984
APPEAL FROM DECISION OF MEDICAL APPEAL TRIBUNAL ON A QUESTION OF LAW
DECISION OF A TRIBUNAL OF SOCIAL SECURITY COMMISSIONERS

[ORAL HEARING]

1. For the reasons hereinafter appearing, the decision of the medical appeal tribunal given on 14 June 1985 is erroneous in point of law and accordingly we set it aside. We direct that the appeal be reheard by a differently constituted tribunal who will have regard to the matters mentioned below.

2. On Form MY1, received by the Secretary of State on 10 May 1984, a claim for mobility allowance was made by Mrs. Hilton on behalf of her son, Mark. The history of that claim is set out in the written submissions of the Secretary of State dated 8 November 1985 and there is no merit in repeating such history here. Suffice it to say that the claimant contends that the tribunal of 14 June 1985 erred in point of law and seeks to have their decision set aside. In view of the uncertainty as to the effect of the House of Lords decision in Lees v. The Secretary of State for Social Services [1985] 1 A.C. 930 on the law as set out in Decision R(M) 2/78, the Chief Commissioner appointed a Tribunal of Commissioners to consider the present case and a further appeal on Commissioner's file CM/39/1984, which involved the same branch of the law. In the event we heard both cases together at an oral hearing at which Mr. R Drabble of Counsel from the Free Representation Unit appeared on behalf of the claimants in both appeals, and Mr I B Glick of Counsel, instructed by the Solicitor's Office of the Department of Health and Social Security, represented the Secretary of State. We are indebted to both of them for their submissions.

3. In brief, Mr Drabble's contention was that the House of Lords decision had not affected anything that was said in R(M)2/78 and that the principles of that particular decision still applied. Moreover, he was supported in this by Mr Glick whose submissions were in all substantial points identical with those of Mr Drabble. For the reasons set out below we accept their contentions.

4. In R(M)2/78 the question at issue was whether or not a boy, who suffered from mongolism but was physically capable of walking, might nevertheless bring himself within the terms of regulations 37(A) of the Social Security Act 1975 as it was then enacted. Section 37A then provided 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 disablement such that he is either unable to walk or virtually unable to do so.

(2) 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.....

At that time the Mobility Allowance Regulations 1975 had been made and regulation 3 provided as follows:-

"(1) A person shall only be treated, for the purposes of section 37A, as 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 or virtually unable to walk: or

(b) the exertion required to walk would constitute a danger to his health 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 unable to walk or virtually unable to do so if he is able to walk with a prosthesis or an artificial aid which he habitually wears or uses or if he would be able to walk if he habitually wore or used a prosthesis or an artificial aid which is suitable in his case."

Although the boy concerned was capable of walking in the sense of placing one foot in front of the other, the medical appeal tribunal nevertheless considered that he was virtually unable to walk. They put the matter as follows:-

"We agree that the boy is suffering from mongolism a condition which is due to faulty genetic inheritance and can therefore be classified as a physical disorder. We accept the evidence that while he walks for some yards he is liable to run, stop, lie down and refuse to go further; this reaction which seriously impairs mobility is directly due to the physical condition of mongolism."

In other words, although the boy was capable of running, let alone walking, nevertheless from time to time by reason of a condition, which was due to a physical disablement, he suffered, as far as walking was concerned, temporary paralysis. The Chief Commissioner upheld the medical tribunal's approach. He observed as follows:-

"17. The medical appeal tribunal recorded a decision and a finding in terms that Robert was unable to walk or virtually unable to do so because of physical disablement, the condition from which he suffered being a physical disorder. They found that physical condition was directly responsible for 'reaction' which seriously impaired his mobility. 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. They did not do so. In so far as there was any mental element which prevented Robert from walking (he has an accepted mental age of 2 years) they attributed his virtual inability, not to conscious volition or mental disability, but to "reaction" itself directly due to his physical condition. I read their decision as concluding that a physical factor was present throughout in the causation of his inability to walk."

It is important to note that the Chief Commissioner made a sharp distinction between a

refusal to walk which was attributable to a conscious choice on the part of the person concerned and an inability to walk which was attributable to a physical disorder. He went on to observe:-

> "....whether the medical criteria are met in a particular case is for the medical authorities to determine, and clearly there are borderline and difficult cases where the expertise of the medical authorities will be decisive one way or the other. For example, there may be cases of claimants suffering from a physical disorder such a Down's Syndrome whose legs are capable of the physical movements of walking, but who are prevented by other aspect of their physical condition from making use of them; or cases of the mentally handicapped who 'choose' not to walk, to be compared with the mentally handicapped who have never learned to walk. Undoubtedly there will be hard cases where the facts will permit of different medical inferences and conclusions."

5. Regulation 3 of the Mobility Allowance Regulations 1975 was subsequently amended. However, prior to a change in the regulation a proposed draft was brought to the attention of the National Insurance Advisory Committee, and that body issued a report dated 24 January 1979. As is clear from that report, the purpose of the proposed amendment was to "clarify the issues" raised by R(M)2/78. In paragraph 6 of the report the Committee observed as follows:-

> "6.The Chief Commissioner in his decision indicated that the weight to be attached to physical and mental disablement where both factors may be present is for the medical adjudicating authorities to decide. The Department have told us that, after taking into account legal and medical advice, they subsequently concluded that the amending regulations should relate to the effect of a disabling condition, rather than its causation.
> 7. We see no reason to dissent. None of the representations we received took exception to such an approach and one or two positively supported it."

It is clear from these observations and from what was elsewhere said in the report that the principles set out in R(M)2/78 were not the subject matter of criticism. All that was being attempted was to expand the phrase "virtually unable to walk", so as to enable the adjudicating authorities to have some statutory guidance as to the factors to be taken into account. In the event, the regulation was amended so as to read as follows:-

> "(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 or 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."

6. Unfortunately, thereafter certain decisions of Commissioners introduced a gloss on the relevant statutory provisions. In R(M)2/81 it was held that a claimant who was blind and also suffered from a physical disablement in his balance mechanism and sense of direction, so that it was impossible for him to control the direction in which he wished to move, albeit it was accepted that he was physically capable of walking, could nevertheless be regarded as unable to walk within the meaning of regulation 3. Moreover the ability or inability of the person concerned to control the direction in which he went was also held to be a material consideration in a later decision, this time by a Tribunal of Commissioners, R(M)1/83. However, this gloss was firmly repudiated by the House of Lords in the Lees decision. There the facts were substantially the same as those of R(M)2/81. The claimant was completely blind and also 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 and it had proved impossible to substitute a guide dog to assist her. She could not move from point A to point B by herself. The claim for mobility allowance was rejected by the Commissioner, and later by the Court of Appeal, and their approach was upheld by the House of Lords. Lord Scarman concluded his opinin with the following observations:-

> "The House was referred to a number of decisions given by Social Security Commissioners on the point of law raised in this appeal, from which it is clear that the question has given rise to differences of opinion. I am satisfied that Mr Rice, the Commissioner who heard this case, reached the correct conclusion in law and that other decisions which differ from his on the law must be held to be to that extent erroneous. Mr Rice considered that, had the legislature intended to include in regulation 3(1)(b) the inability to direct one's walking, it would have done so in clear terms and he went on to say:
>
> > [Blindness] is an affliction which is wholly unrelated to the physical power to move one leg in front of another. Of course, it affects drastically the suffer's scope for walking, in that, outdoors at least, he or she is in need of a guide, or more practically a guide dog. But these are factors which are not directly concerned with the faculty of walking. Now, in the present case, the claimant in addition to suffering from blindness, is inclined to disorientation in open spaces. This, in my judgment, is like blindness, a handicap totally unrelated to her capacity or otherwise to perform the physical act of walking. I appreciate, of course, that the consequence of the claimant's tragic disability is that, although she can walk, she cannot control without assistance the direction in which she walks, she has an ability to walk, but an inability to make proper use of the faculty."

Manifestly, the House of Lords held that the ability of a person to get from point A to point B is wholly irrelevant in construing regulation 3 of the Mobility Allowance Regulations.

7. However, the observations of the House of Lords, which are, of course, binding on all adjudication authorities, have, in our judgment, no bearing on the principles contained in R(M)2/78. There is nothing in the Lees case to indicate that their Lordships were directing their minds to anything that was said in R(M)2/78. They were only concerned with the issue whether the ability or inability to move from point A to point B was a material consideration in construing regulation 3(1). Accordingly, we are satisfied that the law, as expounded in the then Chief Commissioner's decision, still applies.

8. Mr. Glick in his submissions helpfully propounded 2 tests for determining whether a person who was capable of putting one foot in front of another, and so walking in the accepted sense of the word, was nevertheless to be treated as virtually unable to walk. First, one should ask whether his ability to walk out-of-doors was so restricted "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 had to be be treated as virtually unable to walk. All the various elements contained in regulation 3(1)(b) had to be considered separately. Moreover, in applying that test, it had to be assumed that the claimant was, where appropriate, using a prosthesis or an artificial aid. However if the claimant was unable to walk or virtually unable to walk in accordance with the above criteria, then the next question was whether this condition was attributable to some physical impairment such as damage to the brain. The criterion was whether the claimant could not walk, as distinct from would not walk. We agree with the importance of that distinction. Manifestly, if a child, who has been walking perfectly satisfactorily decides to stop, but his refusal to continue further can be overcome by the promise of a reward or the threat of punishment there can be no question of his stopping having arisen out of a physical condition over which he has no control. In the case postulated, he was making a conscious choice, and on no footing could his refusal to walk be identified with a physical disablement. 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.

9. We are conscious that tribunals may often have very difficult cases. For example, there may be instances where the person concerned, who can otherwise walk perfectly well, is sometimes prevented from so doing by a physical disability, but only on rare occasions. It will in those circumstances be a matter of degree as to whether or not that person can be regarded as virtually unable to walk, and it is for the tribunal to make the relevant assessment. Accordingly, they will frequently need to know the relevant history of the walking capacity of the person concerned and they will have to make a judgment as to what evidence they will accept. These issues may prove difficult, but they will have to be resolved by the medical tribunal. In any event, we do not consider that hyperactivism in itself qualifies the sufferer for mobility allowance. If a person can run, as hyperactive children normally can, manifestly they can walk. What is relevant is whether or not they suffer from temporary paralysis (as far as walking is concerned) and, if so, to what extent. These are matters for the medical authorities.

10. In the present appeal the tribunal gave the following reasons for their decision that Mark did not qualify under regulation 3(1):-

> "We find that the claimant, Mark Hilton, has from birth suffered from brain damage leading to severe mental subnormality. We are satisfied that the brain damage is physical. The severe mental sub-normality is such as to give rise to severe behavioural problems. Whether or not accompanied out-of-doors, he is perfectly capable of carrying out the physical movements of walking and, indeed, running but his behavioural problems are such that for substantial periods of time his behaviour is entirely erratic and unpredictable. Sometimes he will walk or run so that he has to be physically restrained and on other occasions he will simply refuse to move.
>
> It is impossible to say whether on any particular day or particular time he will behave in any one way or another. The unanimous finding of the tribunal is that the claimant is suffering from a physical disability."

It would appear that up to this point these were the findings of all the members of the tribunal. The majority decision was as follows:-

> "The tribunal by a majority decides that since the claimant is physically capable of the action of walking, one must disregard the behavioural problems, albeit resulting from the physical disability, in so far as they have the effect that the claimant in the circumstances as found above, does not walk."

Manifestly, the majority's decision was erroneous in point of law. It is clear from R(M)2/78 that once it was established that Marks behavioural problems, which included a failure on occasion to exercise his walking powers, stemmed from a physical disability, they were necessarily relevant. In so far as the majority took the view that they should be disregarded, they erred in point of law. It follows that we must set aside their decision, and direct that the appeal be reheard by a differently constituted tribunal. That tribunal will have regard to the extent of Mark's behavioural problems in so far as they impinge on his failure to walk. It may well be that they will be concerned, not merely with his conduct on the day when they examine him, but with the history of his condition in so far as it is relevant and in particular will require to know the frequency of his failure to walk, when required so to do.

11. For completeness, we should refer to the dissenting view of the chairman. He put the matter this way:-

> "Notwithstanding that the claimant does carry out the physical act of walking in the circumstances found by the tribunal, his behavioural problems which are the consequence of a physical disability and over which he has no control, prevent him from carrying out the physical act of walking and do so with such frequency and so regularly that his ability to walk out-of-doors is so limited in regard to the distance over which and the length of time in which he can make progress on foot, that he is virtually unable to walk and was so unable at the date the claim for Mobility Allowance was received.
>
> It is the chairman's view that the House of Lord's decision in Lees does not affect the decision in R(M)2/78, or the views of the Tribunal of Commissioners as recorded in paragraph 23 of R(M)1/83 or CM/125/1983."

Whilst the chairman appears for the most part to have expressed the law accurately (although the Decision in R(M)1/83 and necessarily also the Decision in CM/125/1983 are not entirely unscathed by the Lees decision) and subject to the premise that the facts were as determined by the chairman, to have reached a decision which could properly be arrived at, nevertheless, we are not clear as to what evidence exactly he relied on, and whether it did in fact give rise to the factual position on which he based his decision. In any event, nothing turns on the point, because the matter must be referred to a new tribunal.

12. Accordingly, we allow this appeal.

(Signed) E.R. Bowen
Commissioner

(Signed) D.G. Rice
Commissioner

(Signed) R.F.M. Heggs
Commissioner

Date: 13th March 1986