VGHH/1/LM

Commissioner's File: CM/044/91

SOCIAL SECURITY ACTS 1975 TO 1990

CLAIM FOR MOBILITY ALLOWANCE

DECISION OF THE SOCIAL SECURITY COMMISSIONER

[ORAL HEARING]

Decision

1. (1) I grant the claimant leave to appeal and, the necessary consents having been given, I now determine the appeal.

(2) This claimant's appeal fails. My decision is that the decision of the medical appeal tribunal (MAT) dated 21 August 1990 is not erroneous in law.

Representation

2. I held oral hearings of this application and appeal and of two other appeals (Moran and Featherstone, the references to which on Commissioner's file are respectively CM/240/90 and CM/144/90) which raise similar questions. In the present case, the claimant (who did not appear) was represented by Mr C. Hyland, from the Birmingham Tribunal Unit. The Secretary of State was represented by Mr M. Jenking-Rees of the Solicitor's Office, Departments of Health and Social Security.

Nature of the appeal

3. The issue before the MAT was whether the claimant was unable or virtually unable to walk in terms of the Mobility Allowance Regulations.

4. The crucial question in this appeal is whether I should follow the decision of a Tribunal of Commissioners in the case of Fuller, the reference to which on Commissioner's file is CM/205/88.

The relevant statutory provisions

5. Regulation 53 of the Social Security (Adjudication) Regulations 1986 provides:

'Definition of "medical question"

53. In this Section any question arising in connection with a claim for or award of mobility allowance -

(a) whether a person is suffering from physical disablement such that he is either unable to walk or virtually unable to do so at the date the claim is received or treated as received or at any subsequent date up to the date the question is determined, and if so, what date: or

(b) whether such inability or virtual inability to walk is likely to persist for at least 12 months from the date found for the purposes of paragraph (a); or

(c) for what period, being a period limited by reference either to the person attaining the age of 80 or to a definite earlier date, the person may be expected to continue to be unable, or virtually unable to walk; or

(d) whether during most of the period during which a person may be expected to continue to be unable, or virtually unable to walk, his condition will be such as permits him from time to time to benefit from enhanced facilities for locomotion; or

(e) which would have been a question under paragraphs (a), (b) and (d) on the day before he attained 65, in the case of a person who is over the age of 65 but under the age of 66 at the date on which the claim is received or treated as received,

is referred to as a medical question."

[Note: At the date the claim to which this appeal relates was received, the age specified in paragraph (c) was 75. The age of 80 was substituted by regulation 3 of S.I. 1989/1689 as from 9 October 1989.]

6. Subject to specified exceptions (not relevant in this appeal), if a medical question arises in any case, the adjudication officer must refer that question for examination and report to one or more medical practitioner (regulation 56). The adjudication officer then determines the medical question or refers it to a medical board (regulation 57). A claimant also has a right of appeal to a medical board (regulation 58). Any decision of the medical board may be appealed by the claimant or referred by an adjudication officer to an MAT (regulation 60). An appeal lies to the Commissioner against the decision of an MAT on a question of law: see section 112 of the Social Security Act 1975 as applied and modified by regulation 61.

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7. The manner in which the decision of an MAT is to be recorded is set out in regulation 31(4) which provides:

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

The claim for mobility allowance

8. The claimant (who was born on 4 July 1972) was awarded mobility allowance from 27 July 1979 to 26 July 1989. On 16 May 1989 a renewal claim was received. This is the current claim.

The medical practitioner's report

9. On 5 June 1989, Dr Mason examined the claimant and expressed the opinion that she was virtually unable to walk. She could manage at least 100 yards on the level if there was something or someone to offer support. In the absence of this she could probably only walk a very few yards due to her ataxia. As the adjudication officer was unable to decide the claim on the basis of this report, the medical questions were referred by him to a medical board.

The medical board's decision

10. On 21 July 1989, the claimant was examined by a medical board. The medical board (Drs Webb and Desai) decided that the claimant was not unable to walk or virtually unable to walk because of physical disablement. Her balance stationary and her walking were satisfactory. She had mild ataxia. She was observed over at least 100 yards which she completed at a good pace with mildly ataxic gait and touched wall for support and to give her confidence.

11. The claimant appealed against this decision to an MAT by letter received on 22 August 1989 saying that her ability to walk had not improved significantly, if at all, since she was previously awarded mobility allowance.

The MAT's decision

12. The MAT heard the appeal on 21 August 1990. The Schedule of Evidence before them included a medical practitioner's report by Dr Wardle dated 13 September 1978 on the original claim. (He had found that the claimant required support but could manage 3-4 steps unaided. Her walking ability was obviously very limited. Her balance while stationary and walking was very unsteady.) It also included the above mentioned medical practitioner's report, medical board decision and letter of appeal from the current claim. An additional letter dated 31 July 1990 from

the Victoria School (signed by Miss Dowsett) was also before the MAT. This stated:

> "Shafina is a mature young lady, who makes every effort to walk wherever she can, however she does experience real difficulty in maintaining her balance both within the school environment and outside.. Although she attempts to make light of it being somewhat embarassed by this problem, she does have a degree of difficulty which puts her on a par with other students in school who do receive mobility allowance.
>
> Within school she has stumbled over uneven flooring and even for no apparent reason. Therefore she does not feel confident, although she is very willing, to undertake tasks which involve carrying something heavy or hazardous, such as a kettle.
>
> Outside she is not, for example, sufficiently stable to take part in shopping expeditions without being accompanied by member of staff. However she is of an age and maturity where she should have the opportunity to go alone on such expeditions, and would be keen to do so by using a taxi.
>
> We would therefore support the family's appeal on the grounds that she is unable to walk functionally (ie. virtually unable to walk)."

13. The claimant was present together with her mother and an interpreter. Mr Hyland represented her. The mother said that the claimant's walking got worse last year. She fell twice a day. Getting up and down she was assisted but not in walking. In reply to Dr Cowan, it was said that the claimant was still at school a special school. She first walked at 10 years old. Walking improved but balance worse. Helped with stairs. No tiredness. Hurt in falls. In reply to Dr Roderick Smith it was said she played rounders but the representative commented "success at games doubtful".

14. The MAT decided:

> "1. (a) The decision of the medical board is confirmed.
>
> 2. The claimant's physical condition as a whole is such that -
>
> (a) he is NOT unable to walk
>
> (b) he is NOT virtually unable to walk
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> (c) the exertion required to walk -
>
> (i) would NOT constitute a danger to his life
>
> (ii) would NOT be likely to lead to a serious deterioration in his health."

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15. The reasons for decision and findings on material questions of fact were recorded as:

"We heard from Mr Hyland of the BTU on behalf of the appellant and from her mother with the assistance of an interpreter. We also heard from Mrs Marklew on behalf of the Secretary of State. All scheduled evidence was carefully considered together with an additional letter of 31 7 90 from Victoria School produced by Mr Hyland. It was submitted that as it was from someone with day to day contact with Shafina, the statements in it should be particularly relied upon.

Our attention was drawn by Mr Hyland to the report of 5 6 89 at page 3 and its reference to Shafina being "very unsteady" etc, and the reference to supervision being required. He also drew attention to the report of 21 7 89 and its reference to holding the wall for support in the course of carrying out the walking test.

Asked about the progress of walking ability, Mrs Begum suggested that after beginning to walk at age 10 as her daughter grew older, the basic walking ability may have improved but the balance got worse and overall her ability to walk has got worse. We were told that if left to herself, she would be likely to fall on average twice a day, but in practice she is always accompanied to prevent this from happening. Mr Hyland made the point that the letter from Victoria School suggested that she had difficulty getting around there, even though it was a purpose-built school for the disabled.

We say Shafina walk for about 20 yards within the building and outside for a total distance for approximately 100 yards. Shafina walked slowly and steadily with a wide base and a suggestion of spasticity. She walked without support, at one stage she veered somewhat towards the wall, but when a member of the tribunal interposed himself between her and the wall, she walked fairly straight and steadily thereafter. Throughout the walk, she required no support.

It must be remembered that qualification for mobility allowance depends largely upon the physical act of walking and in a case like Shafina's, one has to consider how far actual support is required and how much it is simply a question of guidance and reassurance. On the basis of the evidence we have heard, we believe, and we do not consider that this contradicts the information contained in the letter from her school, that she does not require actual physical support, and her condition is one where she should be encouraged to walk whenever possible. Bearing in mind the distance we saw her walk and the time we consider she could continue walking at a slow but reasonable pace, we consider these factors place her outside the scope of Regulation 3(1)(b) as virtually unable to walk.

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Regulation 3(1)(c) was not overlooked, but exertion was not a factor on the evidence before us.

We accordingly confirm the decision of the Medical Board of 21 7 89 that the appellant is not unable to walk or virtually unable to do so because of physical disablement."

The arguments on appeal

16. The claimant applied (through her representative) to the chairman of the MAT for leave to appeal saying (document 26)

"In its reasons for decision, the tribunal seem not to contest the evidence given by Shafina's mother or by Miss R Dowsett from Shafina's school. This evidence is quite strong in that it upholds the claim that Shafina needs physical support to keep her safe while walking. The tribunal, however, appear to have decided solely on the demonstration of Shafina's walking ability on the day, that she does not qualify for Mobility Allowance. They seem not to have taken account of the oral and written evidence available that Shafina will make strenuous efforts to make light of her difficulties, and that the fact that she did not actually fall during the walking test does not show that she is safe whilst walking without support. In short, the fact that Shafina completed the walking test (slowly, veering and with a suggestion of spasticity) is not in itself to outweigh the other evidence available."

17. Leave to appeal was refused by the chairman of the MAT who added:

"NB Decision makes it clear the evidence referred to has been taken into account. Final decision is a medical one."

18. The claimant then applied to the Commissioner for leave to appeal and I asked for a written submission on this application from the Secretary of State. The Secretary of State, in a written submission dated 16 May 1991, rejected the grounds of appeal put forward by the claimant saying that it was for the MAT alone to decide the medical questions set for their determination and in reaching their decision an MAT were entitled to rely on their own observations and expert judgment in reaching conclusions of fact and were free to decide which opinions, if any, of those before them they chose to accept and without explaining the mental processes or the specific diagnostic skills on which they relied. But the Secretary of State submitted, on the basis of decision CM/205/1988 relating to renewal claims, that the decision of the MAT was erroneous in law because it failed to comply with the directions in that decision.

19. Decision CM/205/1988 is that of a Tribunal of Commissioners and is frequently quoted by the Secretary of State in written submissions in submitting that MAT decisions are erroneous in law. In view of the importance of the question whether I should follow this decision, I accordingly issued the following

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direction:

"1. I direct an oral hearing for legal argument as to whether the decision of the Medical Appeal Tribunal is erroneous in law on any ground.

2. The issue before the Medical Appeal Tribunal was whether the claimant was unable or virtually unable to walk in terms of the Mobility Allowance Regulations.

3. The Secretary of State submits that the decision of the Medical Appeal Tribunal dated 21 August 1990 is erroneous in law, in the light of the Tribunal of Commissioner's decision CM/205/1988, in the case of renewal claims, because a tribunal should "explain to a claimant why they have come to their conclusion and this means that they must explain in what way and why that conclusion differs, in cases where the tribunal takes the view that the earlier awarding medical authority came to a wrong conclusion and in that event they will have so to say, but also indicate briefly in what way."

It was submitted by the Secretary of State that in this case the claimant was left in the dark as to why the Medical Appeal Tribunal considered that the claimant no longer satisfied the Mobility Allowance medical conditions and that their findings and reasons for decision did not therefore comply with the general guidelines laid down in CM/205/1988 and was erroneous in law for failing to provide sufficient findings and reasons as required by regulation 31(4) of the Social Security (Adjudication) Regulations 1986.

4. It was stated in decision R(I) 12/75, in paragraph 21 that:

"In so far as the Commissioners are concerned, on questions of legal principle, a single Commissioner follows a decision of a Tribunal of Commissioners unless there are compelling reasons why he should not, as for instance, a decision of superior Courts affecting the legal principles involved."

It is further stated, in paragraph 17, paragraph (c):

"Reported decisions are those selected for reporting. They are so selected by the Chief Commissioner from numbered [now starred] decisions and are primarily so selected if he is satisfied that they deal with questions of legal principle and that they command the assent of at least a majority of the Commissioners".

5. There are two decisions of the superior Courts affecting the legal principle quoted in inverted commas in paragraph 3 above. Neither of them was

referred to by the above mentioned Tribunal of Commissioners.

6. In the case of Braithwaite v Secretary of State for Social Services, decided by the Court of Appeal (Lord Justices Purchase, Mustill and Balcombe) three successive certificates in respect of three successive periods were granted for an attendance allowance, in respect of a child (Dawn born on 3 August 1970) but a further claim for a fourth period was disallowed. Lord Justice Balcombe, considered the criticism of that decision on an appeal to the Court from the decision of Mr Commissioner Morcom, who dismissed the appeal against that decision. In his judgement dismissing the appeal, with which the other Lord Justices agreed, he said:

"In my judgement it is impossible to say that the delegated medical practitioner erred in law in any way in considering the particular position of Dawn, which is what he was considering. He considered the relevant provisions; he considered all the relevant evidence and he came to a conclusion to which it was open to him to come within the ambit of what he had to decide.

He is also criticised by Miss Tayton (the claimant's representative) because he does not specifically indicate what differences he maintains have occurred in Dawn's development since the previous certificate had been granted. But in my judgement there was no legal obligation upon him to do so, and he dealt with the case, in the manner which I have stated, perfectly adequately".

7. In the decisions of Ex Parte Viscusi [1974] 1 W LR (also reported in the Appendix to decision R(I) 2/73) there were three medical appeal tribunals each of which deal with successive periods. The third tribunal differed from the findings of the earlier tribunals and it was submitted to the Court of Appeal that it was incumbent on them to explain (in view of the requirements of regulation 12 of the regulations - now regulation 31(4) of the 1986 Adjudication Regulations) why they differed from the earlier tribunals. Lord Justice Buckley and Lord Justice Roskill, in separate judgements, both rejected this submission and held that such an explanation was unnecessary.

8. There is a further point. The decision of the Tribunal in CM/205/1988 is unreported, although it was starred for reporting, and it does not have the assent of the majority of the Commissioners.

9. Nothing that either Court of Appeal said in the above

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cases, implies that an omission to explain why a Medical Appeal Tribunal or Delegated Medical Practitioner has reached a different conclusion from that arrived at by another Medical Appeal Tribunal or Delegated Medical Practitioner in respect of an earlier period can never constitute an error of law. But the rule as set out in decision CM/205/1988 is not supported by these authorities. If a sufficient explanation is given by the Medical Appeal Tribunal (or Delegated Medical Practitioner) as to why they arrived at the particular conclusion that they did, there is no obligation to go further, and explain why that conclusion differs from that of the earlier tribunal.

10. In the present case, the reasoning supporting the Medical Appeal Tribunal's conclusion appears to be entirely adequate.

11. On the footing that there are compelling reasons for disregarding CM/205/1988 as, in respect of the point at issue, decided per incuriam, where is the error of law in the Medical Appeal Tribunal's decision?"

[Note: Braithwaite's case was decided on 17 March 1986, reference CA/75/1984]

20. Before me, Mr Jenking-Rees, withdrew the Secretary of State's submission and indicated that he supported the reasoning in my direction and that the Secretary of State now opposed the appeal on the ground that the MAT's decision was not erroneous in law.

21. Mr Hyland, after referring me to the terms of the application for leave set out in paragraph 16 above submitted that the final decision of an MAT was not a medical one but a legal one based on medical opinion. The MAT had not given adequate reasons. He submitted that too much had been left to the medical members. Adequate reasons had not been given for rejecting the Victoria School evidence. Although it looked as though decision CM/205/1988 was not good law, the MAT should have dealt with the view of Dr Wardle and they should have commented on every piece of medical evidence put before them. Reliance was placed on decision CM/467/88 (Purcell).

22. Mr Jenking-Rees submitted, as already stated, that the MAT's decision was not erroneous in law and that the findings complied with regulation 31(4) of the Adjudication Regulations. It was for the MAT to give the decision on the appeal. As regards the standard of reasoning he referred me to the decision of the Court of Appeal in Baron v Secretary of State for Social Security which is reported in the Appendix to decision R(M) 6/86 at pages 365, 366 letters D and E, and 367.

Is the MAT's decision erroneous in law?

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23. (1) No, it is not.

(2) As explained in my direction, which is set out in paragraph 19 above, there are compelling reasons for not following Fuller (CM/205/1988), since it is inconsistent with two decisions of the Court of Appeal. The Secretary of State accepts that this is so and Mr Hyland does not now dispute that that decision is not good law.

(3) I disagree with the submission that the decision of the MAT was not a medical one but a legal one based on medical opinion, and that it was accordingly necessary to comment on every specific piece of medical evidence before them. This was the approach adopted in the decision in Purcell reference CM/467/89. I cannot accept it. The MAT in a mobility allowance case is required to decide a medical question: see regulation 53 of the 1986 Adjudication Regulations, set out in paragraph 5 above. Its decision, subject to appeal on the ground of error of law, is final: see section 117(1) of the Social Security Act 1975. It is an expert specialist medical body deciding the "case" (i.e. the medical question) in the way that doctors do, reaching their own expert conclusions upon matters of medical fact and opinion involved in that case: see Regina v Medical Appeal Tribunal ex parte Hubble [1958] 2 Q.B. 228. The MAT dealt with every specific contention that had been put before them and, in my judgment, made it quite clear why the case had gone against the claimant. There was no doubt, on the mother's own evidence and that of the Victoria School that the claimant could walk. The mother said she had been able to do so since she was 10 years old. The question before the MAT was whether the claimant's balancing problems were such that she was virtually unable to walk. The MAT considered the mother's evidence and that of Miss Dowsett of the Victoria School with care and then reached their own expert conclusion that the claimant was not virtually unable to walk. They found that the claimant did not require actual physical support, it was simply a question of guidance and reassurance and that the claimant should be encouraged to walk whenever possible. That decision was one which they were entitled to make. Their findings of fact and reasons for decision are fully up to the standard of reasoning adopted by the Court of Appeal in Baron v Secretary of State for Social Security, reported in the Appendix to R(M) 6/86 and comply, in my judgment, with the requirements of regulation 31(4) of the 1986 Adjudication Regulations.

24. For these reasons, the decision of the MAT was not erroneous in law. My decision is set out in paragraph 1.

(Signed) V G H Hallett
Commissioner

Date: 28 August 1991