Mobility Allowance — 50 yds — not virtually unable to walk.

DGR/SH/14/MD

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SOCIAL SECURITY ACTS 1975 TO 1986
APPEAL FROM DECISION OF MEDICAL APPEAL TRIBUNAL ON A QUESTION OF LAW
DECISION OF THE SOCIAL SECURITY COMMISSIONER

Name: Nigel Paul Down
Medical Appeal Tribunal: Plymouth
Original Decision Case No: 5203/85

[ORAL HEARING]

1. For the reasons set out below, the decision of the medical appeal tribunal given on 30 May 1985 is not erroneous in point of law, and accordingly this appeal fails.

2. This is an appeal by the claimant, brought with the leave of a medical appeal tribunal, against the decision of the medical appeal tribunal of 30 May 1985. The claimant asked for an oral hearing, a request to which I acceded. At that hearing the claimant, who was not present, was represented by Mr Mark Rowland of Counsel instructed by Messrs. Paul Millban and Co, Solicitors, whilst the adjudication officer appeared by Mr James Latter of Counsel, instructed by the Solicitor's Office of the Department of Health and Social Security. I am indebted to them both for their submissions.

3. A claim for mobility allowance was made by the claimant on Form MY1 received by the Secretary of State on 10 May 1983. The history of that claim is set out in the written submissions of the adjudication officer now concerned, and there is no merit in my repeating such history here. Suffice it to say that the claimant contends that the decision of the medical appeal tribunal given on 30 May 1985, confirming the decision of the medical board, was erroneous in point of law. The crucial part of the tribunal's findings reads as follows:-

> "[The claimant] was questioned as to his walking ability now and he states that he can walk for about 30 yards on the level and then he experiences breathlessness, pain and sickness. If he rests for some two minutes he can then perhaps walk for a further 30 yards. At the time of the claim he thinks he could walk about 50 yards before he was stopped by pain and breathlessness."

The relevant time for determining whether the claimant could satisfy the relevant provisions of the Mobility Allowance Regulations 1975 [S.I. 1975 No. 1573] was 10 May 1983, namely the date when the claim was first made (see Baron v. Secretary of State for Social Services, a decision of the Court of Appeal). (Since 1 October 1986 the provisions governing what constitutes the relevant time have been amended - see section 71 of the Social Security Act 1986). Accordingly, the tribunal had to ascertain the claimant's condition as at that date. In the event they accepted the claimant's own evaluation. In their own words:-

> "The tribunal has gone on first to consider the nature of [the claimant's] walking

ability without severe discomfort at the time the claim was made. It finds, on the appellant's own evidence referred to above, that he could then walk in a normal manner, though slowly, about 50 yards before he was stopped by pain and breathlessness."

However, they decided that by virtue of the claimant's ability to walk to that extent he did not satisfy regulation 3(1)(b) of the Mobility Allowance Regulations. It is not in dispute in this case that the claimant is unable to satisfy the provisions of regulation 3(1)(a) and 3(1)(c).

4. Regulation 3(1) 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 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."

5. What constitutes walking has been considered in paragraph 10 of decision R(M)3/78:-

"The word 'walk' is an ordinary English word in common usage and, in the context of regulation 3, means to move by means of a person's legs and feet or a combination of them. I agree with Mr Taylor that regulation 3 does not require a reference to environmental circumstances. I shall not attempt a comprehensive definition of the words in the regulation as I consider it undesirable to do so. Whether a person is 'unable to walk' must always be a question of fact and degree. 'To walk' is a well known verb and doctors, who are aware of the medical condition of a claimant, using their expertise, would rarely have difficulty in deciding whether a person is or is not 'unable to walk' on seeing the person using or attempting to use his or her feet and legs and moving or being unable to move. In my opinion, a test of seeing a person walk by the medical members should rarely require further investigation other than in exceptional circumstances, which would be a matter for the medical members to decide. It is for the tribunal to decide the extent and nature of any test in order to ascertain whether a claimant 'is unable or virtually unable to walk'."

6. In the present case, I am concerned not with the claimant's ability to walk - it is accepted that he can do this within limits - but with whether or not his walking performance is so poor that he can properly be regarded as "virtually unable to walk". The meaning of "virtually unable to walk" is, in my judgment, a question of law. As was said in paragraph 11 of decision R(M)1/78:-

"What "virtually unable to walk" means is a question of law, and in my view it means unable to walk to any appreciable extent or practically unable to walk."

This definition was adopted in decision R(M)3/78 (paragraph 12).

In other words, 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.

7. However, Mr Rowland argued that since the decisions were given in R(M)1/78 and R(M)3/78 the contemporary regulation 3(1) had been amended, so that the original words "virtually unable to walk" simpliciter had been expanded to take the form of paragraph (b) of the present regulation. Mr Rowland argued that the need to take into account questions of distance, speed, length of time and manner in measuring a claimant's progress on foot without severe discomfort suggested, to put it no higher, that something more was contemplated than a mere minimal ability to walk. Mr Rowland supported his contention by pointing out that the whole purpose of making an award under the regulations was to enable the recipient to pay for transport if his walking ability was such that he was unable to derive any practical advantage from it. Whilst Mr Rowland did not go so far as to suggest that anyone with some disability as to walking should be put into the position of a person without that disability by being granted the allowance, so that he might be able to purchase transportation, nevertheless he contended that a generous approach should be adopted in determining whether or not a claimant was virtually unable to walk. In any event, in his submission, an ability to walk 50 yards was not enough to exclude him from the benefit of regulation 3(1)(b).

8. I think that attempting to interpret the regulation by reference to the underlying purpose for which an award is made is fraught with danger. An attempt in this direction was made in decision R(M)3/78. At paragraph 9 the Commissioner observed as follows:-

> "It was submitted by Mr Gibbons that the expression 'unable or virtually unable to walk' was ambiguous. The regulations did not state the amount or quality of a person's ability to walk. He submitted that the words meant an ability to walk a quarter of a mile, or something of that order, to enable a person to walk to the shops or to a bus stop and so carry on a normal life. He said that the claimant should have been subjected to tests to ascertain whether she could walk a distance of something of the order of a quarter of a mile. In the grounds of appeal, it is contended that the true interpretation relevant to this case is that this claimant is within the description set out in the regulations if she is so limited in her ability to walk, as to prevent walking for the minimal essential activities of life in her situation without attendance, equipment and transport available. That seems to me to be adding words to the statutory regulations which were not intended and are not implicit and to be importing a meaning other than the plain meaning."

I agree with that approach. I consider it is just as true today as it was when enunciated in 1978. All that the change in the statutory provision has done is to ensure that in considering whether a person should be regarded as virtually unable to walk certain specific considerations now have to be taken into account. But "virtually unable to walk" still means "unable to walk to any appreciable extent or practically unable to walk".

9. What constitutes an inability to walk to any appreciable extent is a matter of fact and is for the tribunal to determine. They must apply their own judgment, and so long as their decision is not perverse, it is not open to the Commissioner to interfere. In the present case the tribunal decided that, as the claimant could walk without discomfort within regulation 3(1)(b) for 50 yards, he had taken himself out of the category of one who was unable to walk or virtually unable to walk. I consider that the tribunal were entitled to reach this conclusion.

10. Accordingly, the tribunal did not err in point of law, and thus appeal fails.

(Signed) D.G. Rice

Commissioner

Date: 29th January 1987