CM 54/1980

JGM/GJH

SOCIAL SECURITY ACTS 1975 TO 1981

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

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Name:

Medical Appeal Tribunal: Birmingham

Original Decision Case No: 73/1/80

[ORAL HEARING]

1. My decision is that the decision of the medical appeal tribunal dated 30 April 1980 is erroneous in point of law in so far as it includes a finding that the claimant's ability or virtual inability to walk is likely to persist until age 75 but not further or otherwise and I direct the medical appeal tribunal in accordance with section 112(5) of the Social Security Act 1975 applied to mobility allowance by regulation 12 of the Social Security Act 1975 applied to mobility allowance by regulation 12 of the Mobility Allowance Regulations 1975 [SI 1975 No 1573] to revise that decision by substituting for the age 75 the age 60 in the decision and statement of reasons.

2. The claimant is a person who suffered various birth injuries which have severely impaired her mental and physical capacity. A claim for mobility allowance was made on her behalf which is recorded as having been received in the Department of Health and Social Security on 15 March 1979, which I take to be the date on which the claim was received by the Secretary of State for Social Services. Section 37A(7) of the Act provides that except so far as may be provided by regulations the question of a person's entitlement to mobility allowance shall be determined as at the date when the claim for the allowance is received by the Secretary of State. Accordingly the question of her entitlement to mobility allowance on that claim falls to be determined as at that date. This means that it falls to be determined not only on the facts as they stood at that date but also in accordance with the law in force at that date (See Decision CM 1/81 (not reported) at paragraph 10).

3. The claim was initially referred to a medical practitioner who expressed the opinion that the claimant was not unable to walk or virtually unable to do so in terms of the Act and regulations and an award was refused. The matter was then at the request of the claimant's advisers referred to a medical board who reached a like conclusion. On appeal the medical appeal tribunal by the decision now appealed from reached a different conclusion, the terms of which are referred to below; and thereafter the insurance officer made an award of mobility allowance to the claimant until the age of 75. The Secretary of State sought and

obtained leave to appeal out of time against the decision of the medical appeal tribunal and now makes that appeal. He was represented at the oral hearing before me by Mr J P Canlin of the Solicitor's Office of the Department of Health and Social Security and the claimant was represented by Mr R Smith from the Child Poverty Action Group.

4. Section 37A of the Social Security Act 1975 and regulations made thereunder lay down a number of conditions for an award of mobility allowance, to three of which I shall refer as "the medical conditions". These conditions are:-

(1) (section 37A(1)) that the claimant is unable to walk or is virtually unable to do so;

(2) (section 37A(2)(a)) that the inability or virtual inability is likely to persist for at least 12 months from the date when the claim is received by the Secretary of State;

(3) (section 37A(2)(b)) during most of that period the claimant's condition will be such as permits him or her from time to time to benefit from enhanced facilities for locomotion.

5. Regulation 13 of the Mobility Allowance Regulations makes certain questions into medical questions, that is questions for determination, in case of dispute, by a medical board or on appeal by a medical appeal tribunal. Sub-paragraphs (a), (b) and (d) of regulation 15(1) in effect make the questions whether the claimant satisfies the three medical conditions listed in the preceding paragraph into medical questions, with, in the case of sub-paragraph (d) an extension of the period beyond that of the statutory condition. Sub-paragraph (c) makes into a medical question the question for what period (being a eriod limited by reference to the person's attaining pensionable age or to a definite earlier date) the person may be expected to continue to be unable or virtually unable to walk. The precise significance of making this a medical question and of the extension of the period in sub-paragraph (d) is not clear because there is nothing in the Act or regulations which expressly makes it obligatory for anyone to reach a decision on these additional matters for the purpose of deciding a claim. In view of the fact that (subject to excepting regulations) the question of a person's entitlement to mobility allowance is to be determined as at the date of the receipt of claim the period for which the allowance is to be awarded is at large and, as I see it, in the discretion of statutory authorities (i.e. the insurance officer or, on appeal from him of the local tribunal or Commissioner). I do not interpret regulation 13(1)(c) as impliedly requiring the statutory authorities to award the allowance for the period found; much clearer words would be necessary to effect this. No doubt the statutory authorities must bear it in mind and possibly the finding imposes a limit on the period for which the allowance can be awarded.

6. In the present case the Secretary of State put before the medical appeal tribunal a submission that it was for them to decide among other things for what period being a period limited by reference to the

claimant's attaining the age 75 or some definite earlier date she might be expected to continue to be unable or virtually unable to walk; and the tribunal limited the period to the claimant's attaining the age of 75, though the limit of the medical question under the regulations was pensionable age (60 in the claimant's case). They clearly exceeded their jurisdiction albeit at the instance of the Secretary of State. It may be argued that the greater includes the less and that the decision is effective up to the age 60, though I entertain doubts about this (cf Regina v Green [1959] 2 QB 127 at page 132). In any case I think it undesirable to retain on the record a decision embodying such an error. I think it right that the medical appeal tribunal should in accordance with section 112(5) of the Act revise their decision (and the statement of reasons) and that, as they clearly intended to fix the longest period possible, they should do so by substituting age 60 for age 75 in each case. I do not consider that on this account they should revise it further or otherwise.

7. I now come to the substantive question. The Secretary of State seeks to have the decision as a whole set aside as erroneous in point of law. The tribunal found the claimant's physical condition as a whole was such that she was unable to walk and that she had been unable or virtually unable to walk since 15 March 1979. The relevant part of the statement of their reasons reads as follows:-

> "As a result of the birth injury [the claimant] suffered brain damage and her locomotion is very erratic and she is incapable of purpose of direction. As a result she has not been able to be out of the house, because she is incapable of directing her steps for any useful purpose.
>
> We find that the appellant is unable to walk or virtually unable to walk by reason of physical disablement within the meaning of the statutory provisions and further that such inability is likely to persist until age 75. We find further that during that period her condition will be such as will permit her from time to time to benefit from enhanced facilities for locomotion."

8. Under an amendment of the regulations which came into force on 21 March 1979 the circumstances in which it was permissble to find a person virtually unable to walk were notably restricted. and although the Secretary of State in his submission drew attention to the provisions of the regulation as amended the medical appeal tribunal made no reference to the amendment(s) in their decision. As the amendment(s) did not apply to the present claim this was entirely in order.

9. Prior to the amendment(s) it was for the medical appeal tribunal to interpret the phrase "unable to walk or virtually unable to do so" untrammelled by any regulations save one that enabled them to extend the phrase to cases where the exertion was dangerous to life or health (which was not this case). It was for them to decide whether a person able to walk was nevertheless virtually unable to do so. Having regard to the reasons given by the tribunal it would I

think have been more appropriate if the formal decision as well as the stated conclusion embodied in the reasons therefor had been to the effect that the claimant was virtually unable to walk rather than that she was unable to walk but I do not think it right to upset it on that ground.

10. The evidence before the tribunal included (1) the report of the medical practitioner who first examined the claimant who described her gait as a waddle and found that owing to lack of balance she needed supervision on stairs (2) evidence given to the medical board that her balance was so poor that she falls over any small obstacle (3) the medical board's finding that it would be inadvisable for the claimant to attempt stairs unsupervised because her balance is very poor and (4) a letter from the claimant's head mistress that included a statement to the effect that the claimant if startled arches forward and loses balance and that this is so frequent that it makes even a few yards journey hazardous. The tribunal also saw the claimant. There was of course a body of evidence about the extent to which the claimant could walk. But in my judgment there was ample evidence on which they could find the claimant virtually unable to walk because of the erratic nature of her walking, and if their decision had stopped there it would certainly not have been possible to hold it erroneous in point of law.

11. Mr Smith submitted that this was sufficient to support the decision of the medical appeal tribunal in any event regardless of the effect of their observations on lack of purpose of direction etc. Mr Canlin contended on the other hand that there was no way of saying whether or not the tribunal had reached their conclusion by adding the effect of the erratic nature of the walking to the fact that it was without purpose or whether they would have reached a different conclusion if there had been nothing more than the erratic walking. He submitted that if (as he contended) there was an error of law in their findings about lack of purpose of direction this error would vitiate the whole decision. I consider that he was right on this point, so that it is incumbent on me to examine his further submission that there was an error of law in the findings on lack of purpose of direction.

12. His decision on this point was based primarily on Commissioner's Decision R(M) 3/78. In that case a medical appeal tribunal had found a claimant not to be incapable or virtually incapable of walking. and it was argued on an appeal against that decision on the ground of error in law that the words of the Act connoted an ability to walk ¼ mile or something of that order to enable a person to walk to the shops or a bus stop so as to carry on a normal life. The Commissioner found the decision not to be erroneous in point of law and indicated in his decision that inability and virtual inability to walk were not to be considered in the light of the purpose for which walking is required. Mr Canlin submits that accordingly the medical appeal tribunal erred in considering the purpose for which the claimant's walking was required. I think however that this submission is based on a confusion between the subjective purpose of a particular claimant, which was in the mind of the Commissioner in Decision R(M) 3/78, and

the objective purpose of walking in general. I do not think that in the face of the then Chief Commissioner's Decision R(M) 2/78 (the Down's syndrome case) it can be contended that an inability to direct steps in any desired direction (independently of the subjective purpose of the walking) could not be taken into account (at any rate before the amendment of the regulations) in considering whether a person is virtually unable to walk. In the latter case the medical appeal tribunal decision included the following: "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". They went on to find him virtually unable to walk. The main contest in the case was over whether Down's syndrome was physical disablement (a question not put in issue in the present case); but in my judgment the decision (in which the above passage was quoted) must be taken as indicating that a decision is not erroneous in point of law by reason only of its reference to the objective purpose of walking in general.

13. Mr Canlin referred me also to paragraph 19 of Decision R(M) 2/78 where the Commissioner indicated that his decision should not be regarded as decisive of any other case. That I take to mean that he was deciding that the medical appeal tribunal were not wrong in law, not that every sufferer from Down's syndrome must qualify for the mobility allowance. The note of caution was addressed to medical appeal tribunals. It was not an indication that another medical appeal tribunal who reached a like conclusion on similar facts would be held (independently of any change in the law) to have erred in point of law. I do not consider that I can set aside the decision in this case.

14. I would add two points. The regulations were altered within a few days after the claim in the present case, and although that does not affect the present appeal it may have a bearing on the relevance of my decision to subsequent cases. I do not think that on the evidence in this case the tribunal could have found the claimant unable (as opposed to virtually unable) to walk. If their decision had been governed by the new regulations they would have been bound to take them into account. I express no opinion on whether they could consistently with those new regulations (had they applied) have reached the some conclusion as they did. They would certainly have needed to make some reference to the terms of the new regulation in their statement of reasons.

15. Secondly in view of my decision on the substitution of age 60 for 75 the insurance officer will under section 104(1)(b) of the Social Security Act 1975 have power to review his own award of the allowance. Ir would in my judgment be wrong for him to revise his decision any further than is made necessary by the substitution of age 60 for age 75 in the medical appeal tribunal decision.

(Signed) J G Monroe
Commissioner

Date: 2 October 1981

Commissioner's File: C.M. 54/1980
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