CM 57/1980.

RSL/GJH

SOCIAL SECURITY ACTS 1975 TO 1980

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

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Decision C.M. 1/81

1. This is an appeal made with my leave by the Secretary of State from a decision of a Medical Appeal Tribunal dated 11 July 1980 in which they held that the claimant's child, Paul, satisfied the medical conditions for an award of mobility allowance.

2. Paul was born on 10 October 1969 and is described in the case papers as a hyper-active autistic boy. The claimant, who is his mother, claimed a mobility allowance on 25 July 1978, but on 11 December 1978 a medical practitioner to whom her claim had been referred, and on 26 July 1979 a medical board, reached conclusions adverse to the claim. The claimant then appealed to a Medical Appeal Tribunal.

3. The Tribunal gave their decision allowing the appeal on 11 July 1980. Their reasons were as follows (omitting most of the names in order to preserve anonymity):-

> Mr O of the Social Services represented the claimant in the prosecution of this appeal. He produced a further letter from M/S A, headmistress of W School, dated 7th July 1980, supplemental to an earlier letter dated 19th October 1979 and called as a witness Mrs C, a neighbour, who confirmed descriptions already before us of the difficulties of mobility experienced by the child, who must at all times be accompanied.
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> Mr O referred to a report of Dr Rosenbloom dated 29th April 1980, in which the Consultant ascribes the boy's genuinely limited mobility to brain dysfunction. He develops an argument that where there is a dysfunction of a patient's limbs because of inability to receive messages from the brain, this should be regarded as much a physical disability as a musculo-skeletal disorder. Mr O further refers us to Mobility Allowance Regulation 3(1)(b) and contends that on the evidence before us the boy's ability to walk out of doors is limited in every respect by reason of inco-ordination and behavioural problems, his walking

being interrupted by bouts of screaming and associated incontinence. Mr O finally refers us to the Commissioner's decision 57/1/77 concerning the case of E.

There is no doubt that the boy can walk, indeed is hyperactive, but his disability is, in our view, greater than that in the case of E who merely suffered from Down's syndrome.

We accordingly hold that Paul is virtually unable to walk by reason of physical disablement, such physical disablement being brain dysfunction to which Dr Rosenbloom refers.

We accordingly make the award."

The Commissioner's decision there referred to is the reported Decision R(M) 2/78 given by the Chief Commissioner on 22 December 1977.

4. The mobility allowance was introduced by section 37A of the Social Security Act 1975 of which subsections (1) and (7) read as follows:-

"(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."

"(7) Except so far as may be provided by regulations, the question of a person's entitlement to a mobility allowance shall be determined as at the date when a claim for the allowance is received by the Secretary of State."

Those statutory provisions are supported by the Social Security (Mobility Allowance) Regulations 1975 [S.I. 1975 No 1573], of which regulation 3(1) originally read as follows:-

"3.-(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 life or would be likely to lead to a serious deterioration in his health."

That paragraph of regulation 3 was, however, amended (by S.I. 1979 No 172) with effect from 21 March 1979 so as to read:-

"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."

5. In my view, the differences between these two versions of regulation 3(1) are extremely important. The first version gave no indication of the manner in which the description, "virtually unable to walk" was to be interpreted. The second version does so, confining the description to conditions in which walking causes "severe discomfort". I think that that phrase must receive a wide interpretation, and must be held to include pain, fatigue and unease of all kinds. Nevertheless, I do not think that it can be taken to include epileptic fits, the screaming attacks of an autistic child, or the refusal to walk of the mongol child whose case was considered in R(M) 2/78. These episodes have no relationship to inability to walk. Nor to virtual inability to walk as now described. Virtual inability to walk as described in the amended version of regulation 3(1) depends on limitations of distance, speed, time and manner of progressing on foot, not of the onset of fits or tantrums. These may, however, be relevant to the application of what is now regulation 3 (1)(c): see R(M)3/78 paragraph 14.

6. Accordingly, if the claim relevant to this appeal is to be decided under the amended version of regulation 3(1) I would hold that the Medical Appeal Tribunal's decision is erroneous in point of law because the Tribunal gave a wrong interpretation to "virtually unable to walk". On the other hand, if the original version of regulation 3(1) governs the claim, then R(M) 2/78 is authority for holding that the decision now under consideration was within the powers of the Medical Appeal Tribunal and contains no error of law.

7. The submission made by the Secretary of State is that the Medical Appeal Tribunal erred in point of law because of failure to comply with regulation 23(1) of the Social Security (Determination of Claims and Questions) Regulations 1975 /S.I. 1975 No 558/ which requires a Medical Appeal Tribunal to record a statement of their reasons "including their findings on all questions of fact material to their decision". As to this submission, it is true that the reasons of the Tribunal recorded by their chairman do not include any express finding of fact and that is a fault. But unless I am to condemn the whole composition as useless I must infer that they accepted Mr O's statement of the facts, and the record of what he told them is at the same time a record of their findings.

8. However, other points arise on the Secretary of State's submission. The submission asserts that the Tribunal should have

stated "as a question of fact and degree, whether Paul is virtually unable to walk, having regard to distance, time taken to achieve it and manner of walking". He also submits that what "virtually unable to walk" means is a question of law and if the Tribunal allowed considerations of purposeful or "effective" walking or the need to be accompanied or the severity of the disablement to influence their consideration then they were wrong in law.

9. With the submissions outlined in the foregoing paragraph, I am in substantial agreement, and have already dealt with the main point in paragraph 5 above. I also consider that the Tribunal may have indicated a wrong approach in the statement included in their reasons that Paul's "disability is greater than that in the case" dealt with in R(M) 2/78. The approach revealed in that passage appears to be more appropriate to a claim for disablement benefit rather than one for mobility allowance. Mobility allowance, unlike disablement benefit, is not intended to compensate for a handicap, but merely to subsidise the use of transport. In determining a claim for mobility allowance, therefore, comparison of the disability of the person concerned with that of another person is inappropriate. All that is material is the extent to which the person concerned in the instant case is immobilised. As to the need for Paul to be accompanied, this is dealt with not by a mobility allowance but by an attendance allowance, and his mother is in fact in receipt of such an allowance.

10. However, the submissions made by the Secretary of State, with which I have expressed my agreement, are directed to the second version of regulation 3(1). In the light of R(M) 2/78 I do not think that I can employ them to upset the Tribunal decision if the original version of the regulation governs the case. And, in my view, section 37A(7) ensures that it does: see also C.I. 16/69 (unreported) in which the principle prohibiting retrospective legislation was discussed. I consider that the later version only applies to claims dated on or after 21 March 1979.

11. Accordingly, my conclusion is that the appeal fails. The decision of the Medical Appeal Tribunal dated 11 July 1980 is not erroneous in point of law.

(Signed) R S Lazarus
Commissioner

Date: 16 February 1981

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