

CM 59/1980

T/OG

SOCIAL SECURITY ACTS 1975 TO 1981

REFERENCE FROM MEDICAL APPEAL TRIBUNAL ON A QUESTION OF LAW

DECISION OF A TRIBUNAL OF SOCIAL SECURITY COMMISSIONERS

Name: Inder Jie Manrai

Medical Appeal Tribunal: Leeds

Original Decision Case No: 20801/80

[ORAL HEARING]

1. This is one of four references in similar terms by a medical appeal tribunal on a question of law under regulation 28 of the Social Security (Determination of Claims and Questions) Regulations 1975. The questions submitted are -

1. Whether any decision on the question in Regulation 13(1)(c) of the Mobility Allowance Regulations 1975 specifying a period limited by a date earlier than pensionable age can be said to be adverse so as to enable an appeal to be brought to a medical board and, if not,
2. whether the decision of the medical board on 12 November 1979 in this particular case stands (subject to appeal) or whether it is a nullity.

2. At the direction of the Commissioner dealing initially with the reference, the Secretary of State made a submission in writing and a written reply and submission were made on behalf of the claimant. The Secretary of State, in his submission, invited the Commissioner to extend consideration to the question whether any decision of an insurance officer restricting the period of an award to a date before the claimant's 75th birthday is one against which the claimant has a right of appeal; and also to consider whether the claimant similarly has a right of appeal to a medical appeal tribunal under regulation 18(1) against a decision by a medical board restricting the period of an award.

3. At the oral hearing before us, the claimant was represented by Mr J Douglas, solicitor, of the Child Poverty Action Group and the Secretary of State was represented by Mr R G S Aitken of the solicitor's office of the Department of Health and Social Security. The claimant did not attend the hearing before us.

4. The claimant, then aged 49, suffered a cerebral thrombosis in September 1976 which resulted in right hemiplegia. On 30 January 1979 he claimed mobility allowance. The insurance officer referred the medical question arising on the claim to a medical practitioner for examination and report in accordance with regulation 13(2) of the Mobility Allowance Regulations 1975 (referred to as "the regulations"). In a report, dated 10 February 1979, the medical practitioner expressed his opinion to the effect that the claimant satisfied the conditions for an award of a mobility allowance and that the claimant's inability or virtual inability to walk was likely to continue without significant improvement until pensionable age (the upper age limit is now 75). On consideration of the medical question referred to the medical practitioner, the insurance officer may himself determine the question in favour of the claimant or determine it adversely to the claimant or refer the question to a medical board for their decision (regulation 15(2)). The insurance officer decided the question in the claimant's favour to the extent that he awarded the allowance but limited the period of the award to 12 months from 30 January 1979 to 29 January 1980.

5. The claimant objected to the period so limited because he wanted to obtain a motor car on lease from Motability which is not available unless an award covers a period of at least 5 years. Mr Douglas drew attention to the claimant's letter of 8 April 1979 in which he objected to the limitation of the period of the award because he claimed that his disability was permanent and contended in effect, that he should have been awarded the allowance for the maximum period. The claimant was advised that he could appeal to a medical board against the insurance officer's decision and he did so. The Secretary of State conceded that there was good cause for the late appeal. The appeal was duly referred to a medical board for their decision in accordance with regulation 17(1). On 12 November 1979, the medical board decided that the claimant did not satisfy the medical conditions for an award of mobility allowance. The insurance officer thereupon reviewed and revised his decision awarding mobility allowance under section 104 of the Social Security Act 1975 (referred to as "the Act") and regulation 15 of the regulations so that benefit was not payable from and including 30 January 1979 and repayment was not required of benefit overpaid. The claimant then appealed against the decision of the medical board and the appeal was referred to the medical appeal tribunal in accordance with regulation 18(1) of the regulations. The medical appeal tribunal referred the questions stated above to the Commissioner.

6. Regulation 13 of the regulations provides -

"13(1) In these regulations any question arising in connection with a claim for or award of allowance -

(a) whether a person is suffering from physical disablement such that he is either unable to walk or virtually unable to do so; or

(b) whether such inability or virtual inability to walk is likely to persist for at least 12 months from a specified date; or

(c) for what period, being a period limited by reference either 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; 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,

is referred to as a medical question.

(2) Subject to the provisions of regulation 14 and of regulation 17(2), if a medical question arises in any case, the insurance officer shall forthwith refer that question for examination and report to one or more medical practitioners."

Regulation 15 of the regulations provides -

"15(1) If a medical question has been referred as provided by regulation 13(2), the insurance officer shall, subject to the provisions of paragraph (3), proceed with the consideration of that question as soon as possible after he has received the report of the medical practitioner or practitioners to whom it was so referred.

(2) On consideration of the question so referred, the insurance officer may -

(a) himself determine the question in favour of the person in respect of whom the allowance is claimed; or

(b) himself determine the question adversely to the person in respect of whom the allowance is claimed; or

(c) refer the question to a medical board for their decision.

(3) Subject to the provisions of these regulations, the provisions of sections 100, 103 and 104 shall apply as if the medical question were a disablement question in relation to industrial injuries benefit and as if reference in those sections to the determination of, or to the review of the decision of, either of the disablement questions in relation to industrial injuries benefit included references to the determination of, or to the revision of the decision of, a medical question under these regulations."

7. Mr Douglas submitted that the insurance officer's decision was adverse since it did not award the allowance until pensionable age in accordance with the medical practitioner's opinion and that the notification of the decision in writing to the claimant should therefore have stated the reasons for the decision in accordance with regulation 16(1)

of the regulations. In our judgment, the decision was adverse as regards the period of the award and the insurance officer should have stated his reasons as required by that regulation. We do not regard the reason for the objection to the period as relevant. It is sufficient that the claimant disagreed with the limitation of the period of the award. Mr Douglas referred to Decision R(U) 7/81, paragraphs 20 and 21, in which a Tribunal of Commissioners stated that it is not always immediately obvious whether a decision is favourable or adverse and it may only become obvious when the person concerned objects to the decision. We agree with the Tribunal's opinion that reasons should be given when the person concerned raises an objection but that a failure to do so does not invalidate a decision of an insurance officer.

8. Mr Douglas submitted that the insurance officer's decision constituted two different decisions, one being a decision on a medical question as to whether the conditions for an award were satisfied and the other being a decision on the period of the award, which he contended was a question for the insurance officer and not a medical question. His contention was that, on the medical question, the insurance officer had made a decision under regulation 15 of the regulations and on the period of the award a decision under section 99 of the Act, the latter decision being adverse to the claimant. He submitted that since the decision on the medical question was not adverse, the claimant had been incorrectly advised that he should appeal to a medical board and he should have been advised to appeal to a local tribunal under section 100 of the Act. He relied upon a letter from the Department of Health and Social Security, dated 5 March 1982, in which it was stated that the claimant's case and two other similar cases had been referred to the insurance officer under section 98(1) of the Act and that the insurance officer had then decided the claims in favour of the claimants under section 99 of the Act. He submitted that the whole procedure which had been followed was a nullity. He acknowledged, however, that, if the claimant had appealed to a local tribunal, it would have been open to the insurance officer to certify that the decision on the medical question was the sole ground of his decision and that no appeal would then lie under section 100(3) of the Act without leave of the chairman of the local tribunal. That would be so because of the provisions of regulation 15(3) set out above. Mr Aitken submitted that the period of the award is so tied in with the medical issue that it cannot be separated and that an appeal is an appeal against the medical question.

9. The regulations provide a procedure for dealing with claims for mobility allowance separate from that applying to other claims under the Act. Regulation 13(1) specifies four questions arising in connection with a claim for or an award of allowance which are identified as "a medical question". Sub-paragraphs (c) and (d) include the period of a claim or award as a medical question. Indeed, when considering the medical condition for an award, the period during which the condition is likely to be satisfied is inseparably related to the qualifying condition. Sub-paragraph (b) specified a period of at least 12 months during which the condition is likely to persist from a specified date.

There might be other questions with which an insurance officer might have to deal other than the medical question, such as conditions as to residence or presence in Great Britain (section 37A(1) of the Act and regulation 2 of the regulations) and questions under regulation 4 (entitlement to an allowance in respect of weeks before that in which claim is received by Secretary of State) and regulation 8 (cases where allowance is not payable because a person has the use of an invalid carriage or other vehicle provided by the Secretary of State or has received or is receiving certain payments towards the cost of running a private car or other analogous payments). Such questions are unrelated to the medical question, other than that they do not arise unless a person satisfies the medical condition for an award, and would be submitted to an insurance officer under section 98 for him to deal with under section 99 of the Act.

10. When the insurance officer received the report of the medical practitioner on the medical question, he was not obliged to determine the question but could have referred it to a medical board for their decision (regulation 15(2)(c)). Having determined the question himself, and the claimant having objected and given notice of appeal, the insurance officer was obliged, after receiving the notice of appeal, to refer the question to the medical board for their decision (regulation 17(1)). We reject Mr Douglas's submission that in those circumstances the medical issue and the period are severable and fall to be determined on appeal by different bodies, the medical issue by a medical board and the issue as to the period of the award by a local tribunal. It is, in our view, clear beyond argument that both constitute "a medical question" (regulation 13(1)) against which there is no right of appeal to a local tribunal.

11. Mr Douglas submitted, in the alternative, that if the medical board had jurisdiction to determine the appeal then, since the medical issue as to satisfying the condition for an award was not decided adversely to the claimant and the appeal was only against the period for which the allowance had been awarded, the board were not required or entitled to decide any other question except the period under regulation 13(1)(c). He contended that they did not decide the only question they had jurisdiction to decide but decided other questions which they had no jurisdiction to decide.

12. In our opinion, the appeals procedure does not confine the enquiry by a medical board to the only issue or issues to which objection has been taken. The jurisdiction is inquisitorial and not adversarial as in the Courts. A submission on similar lines was made on behalf of the claimant before a Divisional Court of the Queens Bench Division in Regina v Medical Appeal Tribunal (North Midland Region) Ex parte Hubble [1958] 2 Q.B. 228 when Diplock J (as he then was), giving the judgment of the Court, said at p 240 -

"We think that this submission is based upon a misapprehension of the purpose of the Act [then the National Insurance (Industrial Injuries) Act 1946] and the functions of medical boards and medical appeal tribunals. A claim by an insured person to benefit under the Act is not truly analogous to a *lis inter partes*. A

claim to benefit is a claim to receive money out of the insurance funds fed by contributions from all employers, insured persons and the Exchequer. Any such claim requires investigation to determine whether any and if so what amount of benefit is payable out of the fund. In such an investigation the Minister or the insurance officer is not a party adverse to the claimant. If analogy be sought in the other branches of the law, it is to be found in an inquest rather than in an action."

Although the provisions of the later Acts and the benefits available have changed, the structure of the present Act is similar to the Act of 1946 and subsequent Acts and the principle stated above applies. Furthermore, the jurisdiction is statutory and there is no provision for appealing against a part only of a decision. By comparison, in the Rules of the Supreme Court, Order 59, rule 3(1), specific provision is made that - "Notice of appeal may be given either in respect of the whole or in respect of any specified part of the judgment or order of the court below;" It has always been the practice of the adjudicating authorities under the National Insurance and Social Security Schemes to treat every appeal as involving a complete re-consideration of the claim or question, other than when jurisdiction is confined to an appeal with leave on a question of law only. It might be that regulations are framed with that in mind.

13. Attention was drawn to the different language of regulation 17 and regulation 18. In regulation 17, the insurance officer is required to refer the question to a medical board for their decision. As to the question to be referred, one has to look at regulation 13(2) from which it appears that the question is that referred for examination and report to one or more medical practitioners. Regulation 18(3), relating to an appeal or reference to a medical appeal tribunal provides -

"(3) Where a medical question is referred to a medical appeal tribunal under the foregoing provisions of this regulation, the tribunal, upon determining the question referred, may proceed to determine any other medical question which arises in connection therewith and, where a decision on any such question has been given by a medical board, may confirm, reverse or vary that decision."

The structure of the language of the latter part of the sub-paragraph envisages that a medical board might also have given a decision on "any other medical question" which arose in connection with the question referred.

14. Mr Douglas also submitted, on the basis of his previous submissions, that the decision of the insurance officer reviewing the decision awarding mobility allowance to the claimant for the period 30 January 1979 to 29 January 1980, and revising it so that benefit was not payable but not requiring repayment, was also a nullity. This does not arise on the questions referred by the medical appeal tribunal but it follows from the opinions we have expressed on Mr Douglas's other submissions that it was not a nullity. The decision on review was made under section 104 of the Act because the decision was dealing with

payment of benefit only following the decision of the medical board on the medical question. We agree that an appeal from that decision would be to a local tribunal. On the medical question, an appeal from the medical board's decision which resulted in that review lies to the medical appeal tribunal under regulation 18.

15. Mr Aitken submitted that the insurance officer has to decide the medical question under regulation 13(1) and is not bound by the opinion of the medical practitioner but has to make up his mind on the medical view and other factors. Other factors may include those which we have mentioned in paragraph 9 above. We agree that that is the function of the insurance officer. Plainly, he is not bound to accept the opinion of the medical practitioner because he may refer the question to a medical board (regulation 15(2)(c)). Mr Aitken submitted that the medical question had been decided adversely to the claimant if the award was not for the full period available. He did not make it clear whether he was contending that by the full period he meant to the age of 75 or whether he meant the full period expressed in the opinion of the medical practitioner. We regard a decision of an insurance officer as adverse if it is for less than the period stated by the medical practitioner or by a medical board. There must be many cases in which the disability is unlikely to last for the maximum period. A decision for a limited period is not final for all time and renewal proceedings may be taken. An insurance officer is entitled to exercise his own judgment as to the action he will take under regulation 15(2) on receipt of the report of the medical practitioner. The type of situation that has arisen in this case might be avoided in future if an insurance officer, who does not feel able to follow the medical practitioner's report on all issues, refers the medical question to a medical board instead of making a decision himself. Mr Aitken submitted that an insurance officer, in making an award, is bound by the period stated by a medical appeal tribunal because such tribunal is the final medical authority on the medical question. We agree with that submission. It is therefore of the utmost importance that a medical appeal tribunal should be precise as to the period for which, in their opinion, the medical condition for an award will be, or is likely to be, satisfied. The review procedure is available under regulation 20 if a decision is given in ignorance of, or is based upon a mistake as to, some material fact or if there has been a relevant change of circumstances.

16. Our opinion on the questions submitted, for the reasons we have set out, is as follows -

1. Answer - No
2. Answer - The decision stands (subject to appeal) and is not a nullity.

3. On the questions we were invited by the Secretary of State to consider, we do not regard any decision of an insurance officer restricting the period of an award to a date before the claimant's 75th birthday as being one against which the claimant necessarily has a right of appeal. We can think of no good reason why awards of mobility allowance should not be subject to limited periods in appropriate cases comparable with the practice for awards of disablement benefit for industrial injuries. If, however, an award is for less than the period indicated in the medical question, there is a right of appeal. In our opinion, a claimant has a right of appeal to a medical appeal tribunal under regulation 18(1) against a decision by a medical board restricting the period of an award.

(Signed) I O Griffiths
Chief Commissioner

J S Watson
Commissioner

D G Rice
Commissioner

Date: 27 May 1982

Commissioners' File: C.M./59/1980
DHSS File: B. 51023/208