

CM 67/1984

(47)

MJG/EA

SOCIAL SECURITY ACTS 1975 TO 1982

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

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Name:

Medical Appeal Tribunal: London South

Original Decision Case No: 3

1. I allow the appeal on behalf of the claimant against the decision of the medical appeal tribunal dated 3 November 1983 and I set that decision aside as erroneous in law. I remit the case for rehearing and redetermination, in accordance with this decision, to a differently constituted medical appeal tribunal: Social Security Act 1975, section 112.

2. This is an appeal to the Commissioner on behalf of the claimant, a married woman living with her husband, against the decision of a medical appeal tribunal dated 3 November 1983, which awarded to the claimant mobility allowance. The award was, however, made not from the date on which the claim was received by the Secretary of State namely 5 November 1980, but only as from 16 September 1981. Dealing with that point the tribunal said in their reasons for decision,

"We have considerable difficulty in deciding at what point the gradual deterioration, spoken of by [the claimant's] husband and Dr A -, reached the point where she came within the Regulations but, making the best estimate that we can, we put this at 16 9 81. ... The allowance should be awarded".

3. The claimant's appeal is against the medical appeal tribunal's refusal to grant mobility allowance as from the date that the claim was received namely 5 November 1980 and to grant it only from the later date of 16 September 1981. In the grounds of appeal to the Commissioner on behalf of the claimant the reasons given for suggesting that this course taken by the medical appeal tribunal was erroneous are largely factual. That would not of itself ground an appeal to the Commissioner, to whom appeal lies only on a question of law. However the Secretary of State's representative in relation to this dating question submits that the decision of the medical appeal tribunal was erroneous in law because,

"[The tribunal's decision] records that the question of entitlement was considered as at 16 [September] 1981 instead of as at 5 November 1970 (the date of claim) as required by

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section 37A (7) of the Social Security Act 1975. Unfortunately paragraph 3 of form MY371 (on which the MAT recorded their decision) was incorrectly drafted, in view of the provisions of section 37A (7), in that sub-paragraph (b) erroneously invited the tribunal to consider the question of [the claimant's] entitlement from a date later than that on which her claim was received. Steps are now being taken to revise and correct this form".

4. Section 37(A) (7) of the Social Security Act 1975 (as inserted by the Social Security Pensions Act 1975, section 22(1)) reads as follows:-

"37(A)(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".

In the present case the claim was received by the Secretary of State on 5 November 1980 and, unless there is some relevant exception in regulations, the medical appeal tribunal should therefore have considered the question of entitlement as at 5 November 1980 and not as at some later date, e.g. the one given by the tribunal, namely 16 September 1981. I therefore accept the submission to this effect of the Secretary of State and must set the tribunal's decision aside as being erroneous in law, though clearly the tribunal was not to blame, since the version of form MY371 then current led them into this error. In fact the only relevant exception in the regulations is to be found in regulation 5(i) of the Mobility Allowance Regulations [S.I. 1975 No 1673] which provides,

"5 (1) A claim for an allowance may be made, or treated as made, for a period beginning on such date later than the date on which the claim was received, being a date not more than 3 months after the day on which it is so received, as the Secretary of State may determine".

The Secretary of State may wish to give consideration in this case as to whether to exercise his powers under regulation 5(1) to regard the claim of 5 November 1980 as being for a period beginning on a later day not more than 3 months after the day on which the claim was received but that is not a matter on which I have any jurisdiction.

5. Subject to that, the new medical appeal tribunal that rehears this case must determine the question of entitlement to mobility allowance as at the date the claim was received, namely 5 November 1980. In that connection the Secretary of State's representative submits (written submission dated 4 September 1984 paragraph 2),

"The inescapable inference to be drawn from the [medical appeal tribunal] decision is that the tribunal concluded that [the claimant] was not virtually unable to walk on 5 November 1980, a conclusion which is criticised in the grounds of appeal. In this respect it is submitted that a medical appeal tribunal is an expert body who are entitled to prefer their own

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clinical assessment of a person's condition to any opinion urged on them by reference to medical reports. This tribunal were accordingly entitled to make their own judgment of the position in November 1980 in preference to the evidence of Dr A and [the claimant's husband]".

6. I accept that submission as being correct. The tribunal was perfectly entitled to differ from the assessments of Dr A and the claimant's husband and I have no power to interfere on questions of fact or medical opinion and diagnosis. However the new tribunal that rehears this case will presumably wish to reconsider the whole case anew and not be bound by the inference of fact in the tribunal's decision of 3 November 1983 (see regulation 39 of the Social Security (Adjudication) Regulations [1984 S.I. 1984 No 451]). In that connection the new tribunal may wish to note that the Decision of a Tribunal of Commissioners in R(M) 1/83 (in particular paragraphs 22 to 25), dealing with mobility allowance, was cited to the Court of Appeal in another mobility allowance case - Lees v Secretary of State (decided on 9 February 1984 - the new tribunal that hears this case should have a transcript of the Court of Appeal's judgment supplied to it). I perhaps ought also to add that in a Decision by me on Commissioner's file C.M. 125/1983 I held that the Decision in R(M) 1/83 was not, in whole or in part, over-ruled by the Decision of the Court of Appeal in the Lees case so far as concerns certain children's cases. However, I understand that the Lees case is now going to the House of Lords, and the new medical appeal tribunal should enquire whether the Lords' decision has been given and, if so, ask for particulars of it.

7. The new tribunal will need, in the light of the up-to-date law on the subject, to make a finding whether at the date the claim was received i.e. 5 November 1980 (or, if the Secretary of State so certified, at a date within 3 months thereafter - see paragraph 4 above) the claimant satisfied the conditions for entitlement to mobility allowance. If the new tribunal considers that she did not then satisfy the conditions for entitlement, they must of course dismiss the appeal. It would then be open to the claimant to make a fresh claim bearing in mind that the medical appeal tribunal of 3 November 1983 found that there had been a deterioration such that by 16 September 1981 the claimant had satisfied the conditions for entitlement. In this connection I perhaps ought to point out however that there is no power to award mobility allowance before the date of claim.

(Signed) M J Goodman
Commissioner

Date: 6 December 1984

Commissioner's File: C.M. 67/1984
DHSS File: