

JGM/BC

CM 74/1984

(30)

SOCIAL SECURITY ACTS 1975 TO 1984

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

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Name:

Medical Appeal Tribunal: Bristol

Original Decision Case No:

1. My decision is that the decision of the medical appeal tribunal dated 1 July 1983 was erroneous in point of law and it is set aside. The matter must be placed before a different tribunal.

2. The claimant made a claim for mobility allowance dated 5 April 1982 which was received in an office of the Department of Health and Social Security on 7 April 1982. The matter was first referred to a medical practitioner who in a report dated 14 June 1982 based on an examination on that day expressed the opinion that the claimant's physical condition as a whole was not such that she was unable or virtually unable to walk. In the course of her statement to the medical practitioner the claimant (who complains of back pain) stated that she had had a spinal injection about two months previously, which had helped.

3. The matter was then referred to a medical board, who again reported that the claimant had stated that she had had an epidural in April 1982. The medical board on 17 September 1982 found that the claimant's physical condition as a whole was such that she was virtually unable to walk but that this inability was not likely to persist until the expiration of 12 months from 7 April 1982 (the date of receipt of the claim).

4. The claimant appealed to the medical appeal tribunal who heard and saw the claimant (who arrived in a wheelchair) and her representative on 1 July 1983. They found that the claimant had been unable or virtually unable to walk from 17 September 1982, the date of the medical board hearing, and that this incapacity was likely to persist for at least 12 months from that date. This however was not enough to enable the claimant to be awarded mobility allowance from the date that her claim was received by the Secretary of State for Social Services, and the claimant with my leave now appeals to the Commissioner.

5. The medical appeal tribunal referred specifically in their reasons to a report dated 26 May 1983 from a consultant orthopaedic surgeon (to whom I shall refer as N) who had treated the claimant. Their conclusion that the claimant was on a balance of probabilities not virtually unable to walk during the period from 7 April to 16 September 1982 was based largely on this report. The report contains a statement as to the date of the spinal injection (which was given in the claimant's recorded statements to both the medical practitioner and the medical board as April 1982) as having been in June 1982. No comment was made on this discrepancy, and if

as seems to me probable, the injection (or at any rate an injection) was given in April the conclusions of the tribunal about the start of the claimant's incapacity might (I do not say would necessarily) have been different had they appreciated that the claimant received an epidural at or about the time of her claim. I think that having regard to what was said in Decision R(I) 18/61 at paragraph 13, I ought to set the decision aside on that ground.

6. There is however another ground on which the Secretary of State submits that the decision is erroneous in point of law. Section 37A(7) of the Social Security Act 1975 provides as follows:-

"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 a claim for the allowance is received by the Secretary of State".

It is contended on this account that the medical appeal tribunal erred in law in making a finding that the claimant was virtually unable to walk at a date other than that on which the claim was so received, notwithstanding that the form MY 365 completed by the tribunal provides for answering the question as to a date later than that of the claim. I am told that it is proposed to have the form altered.

7. I am not sure that I agree with this contention and as at present advised I should regret it if the form was amended. There is a division of function in claims to mobility allowance between the medical authorities and the other determining authorities (now the adjudication officer, the social security appeal tribunal and the Commissioner). Certain questions are by virtue of regulation 53 of the Social Security (Adjudication) Regulations 1984 (formerly regulation 13 of the Mobility Allowance Regulations 1975) made into medical questions that must if they arise be referred to the medical authorities. Among such questions is the question "whether a person is suffering from physical disablement such that he is either unable to walk or virtually unable to do so." This is one of the questions referred to the medical authorities in this case. Nothing is said in the regulation as to the date as at which the claimant has to be found to be suffering or not suffering from such physical disablement. In the ordinary meaning of the words it should mean at the date of the decision. But to award the allowance as at any particular date one needs to know whether the condition is satisfied at that date; except in so far as section 37A(7) makes it sufficient and/or necessary to show that the condition was satisfied at the date of the claim. In the present case the tribunal's reasons show that they considered that the claimant was not so suffering at the date of the claim, and this is enough if the decision stood to justify a decision on the part of the adjudication officer that the allowance is not payable from the date of the claim. I am not sure that I follow why the decision is erroneous if the tribunal went on to decide some superfluous question about the claimant's having subsequently become unable to walk. Indeed I am far from clear that it is superfluous.

8. The effect of section 37A(7) is obscure. In the case of other benefits, such as, say non-contributory invalidity pension it has always been perfectly possible for an award to be made of the benefit from such date as a person is found to satisfy the medical or other conditions even if the claim was made at a time when the conditions were not satisfied. Is it different (on account of section 37A(7)) in relation to mobility allowance?

9. One possible answer to this question is that an open-ended claim for mobility allowance, like an open-dated claim for non-contributory invalidity pension (as to which see Decision R(S)1/83 at paragraph 9), might be treated as being continued to be made (and received by the Secretary of State) from day to day until it is withdrawn or finally determined. If this could be applied, notwithstanding section 37A(7), to claims for mobility allowance there would, if I had not set the decision aside, be no reason why this claimant should not have been awarded mobility allowance by the adjudication officer from the date found in the medical appeal tribunal's decision as that from which the claimant was unable or virtually unable to walk. It can be argued however that section 37A(7) precludes this (cf Decision C FIS. 2/84 at paragraph 8) and that the prudent course for a claimant who is unsure of the date when he or she first qualifies or will qualify for mobility allowance, is to submit a claim every day until benefit is awarded, especially as back claims for mobility allowance are not admissible. If this is really the case an excepting regulation is called for immediately.

11. It is possible that the decision of the Court of Appeal in Insurance Officer v Hemmant [1984] 1 WLR 857, is relevant. There the position was reversed in that the conditions for an award were satisfied at the date of claim but thereafter ceased to be satisfied. The Commissioner applied logic to the case and held that because of section 37A(7) neither an original nor a revised decision given on the claim could take account of a change of circumstances subsequent to it. The Court of Appeal preferred a common sense approach, and rejected the Commissioner's interpretation, which was out of line with the clearly expressed legislative intention in relation to other forms of non-contributory benefit (see page 863 of the report). Why should not the same be the case where the conditions are not satisfied at the date of claim but are subsequently satisfied; and why should not the rules applicable to non-contributory invalidity pension (now replaced by severe disablement allowance) about treating a claim as being continually renewed be applicable to mobility allowance? These questions may have to be answered if the new medical appeal tribunal gives a decision to the effect that the claimant was unable or virtually unable to walk at a date subsequent to the date of claim but not earlier. Meanwhile the claimant might be well advised to consider making a repeat claim for mobility allowance as some sort of insurance against an adverse answer.

11. The appeal is allowed.

(Signed) J G Monroe
Commissioner

Date: 14 December 1984

Commissioner's File: CM/74/1984
DHSS File: