MobA – Decision to refuse to undergo Colostomy does not affect whether unable to walk

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SOCIAL SECURITY ACTS 1975 TO 1990

SOCIAL SECURITY ADMINISTRATION ACT 1992

CLAIM FOR MOBILITY ALLOWANCE

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Name: Lilian Lashmar (Mrs)

Appeal Tribunal: Whittington

Case No: D/21/021/92 0095

1. For the reasons set out below, the decision of the Disability Appeal Tribunal ("DAT") given on 26 May 1992 is erroneous in point of law, and accordingly this appeal succeeds.

2. On 26 May 1992 the MAT by a majority decided that the claimant was unable to satisfy the medical conditions for an award of mobility allowance. The chairman dissented. The claimant contends that the decision of the majority was erroneous in point of law.

3. One of the issues before the tribunal was whether a refusal by the claimant to undergo a colostomy was something which had to be taken into account. The majority members proceeded on the basis that her refusal to have a colostomy was analogous to a refusal to use a prosthesis, such as a walking stick, and that her ability to walk should be considered as if the operation had in fact been carried out.

4. This approach was rejected by the dissenting member, who said as follows:-

> "Without prejudice to findings on the other matters the Chairman would have accepted [the claimant's] evidence concerning her incontinence and the effect it has on her mobility, would have found that she is only able to walk for a very limited time without severe discomfort, and that this would amount to her being virtually unable to walk within the regulations. This is a condition that would have lasted for at least 12 months from the date of claim and she would

have been able to benefit from time to time from enhanced facilities for locomotion. It was wrong in law to treat colostomy in the same way as a walking stick. She has not had the colostomy and should be judged on her walking ability as it is, and not as it might be after a particular operation, except that the possibility of an operation might justify making a time limited award. There was ample medical evidence to support her account of the effect on her walking of her incontinence."

I consider that the approach of the chairman is right, and that of the majority wrong.

5. Manifestly, the correct test is whether or not the claimant is unable or virtually unable to walk. Her capacity for walking has to be determined in the light of her existing condition, not in the light of a condition which might be improved if an operation is undertaken. In other words, the claimant's condition must be viewed as it is, not as it might be. Of course, there is a qualification contained in regulation 3(2) of the Mobility Allowance Regulations 1975 which deals with "a prosthesis or an artificial aid". It reads as follows:-

" 3. (2) ... a person shall not 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 he is not unable or virtually unable to walk with a prosthesis or an artificial aid which he habitually wears or uses or if he would not be unable or virtually unable to walk if he habitually wore or used a prosthesis or an artificial aid which is suitable in his case."

That is a special provision which requires a prosthesis or an artificial aid, which the claimant habitually wears or uses, to be taken into account in determining his walking ability. It is not enough to assess his capacity without the assistance of these items. However, there cannot be read into this a principle that a claimant's walking capacity should be adjudged on the basis that he had undergone major (or for that matter minor) surgery to improve his performance. Regulation 3(2) is restrictive in its scope, and cannot be extended so as to require a claimant to improve his current medical condition. It would indeed be alarming to a claimant to know that if his walking capacity could be improved by such serious and invasive surgery as a colostomy or double coronary by-pass operation, he was required to undergo such surgery if he expected to establish title to mobility allowance.

6. There are no grounds for equating a colostomy with the use of a walking stick, and the chairman was right to dissent from the majority members of the tribunal. Accordingly, the tribunal erred in point of law, and I must set aside their decision. I direct that the appeal be reheard by a differently constituted tribunal who will determine the matter by reference to the claimant's actual condition, not her condition after a colostomy.

(Signed) D.G. Rice
Commissioner

(Date) 14 March 1994