C.M. 90/1981

JSW/FB

SOCIAL SECURITY ACTS 1975 TO 1981

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

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Name:

Medical Appeal Tribunal: Nottingham

Original Decision Case No: 56/9/81

[ORAL HEARING]

Decision C.M. 2/82

1. My decision is that the decision of the medical appeal tribunal, dated 2 April 1981, is not erroneous in law.

2. This is an appeal by the Secretary of State, who was represented at the hearing before me by Mr J P Canlin, of the solicitor's office of the Department of Health and Social Security. The claimant was represented by Mrs R Goldfarb, senior welfare rights officer of the social services department of a local authority.

3. The claimant, now aged 39, suffered severe brain damage from herpes encephalitis, which has seriously affected her intellect and, according to a report, dated 23 March 1981, by Dr Leslie, a consultant in mental handicap, she is in many ways like an infant. A claim for mobility allowance was made on her behalf by her husband and a summary of the history of the case is set out in the Secretary of State's written submission.

4. The claimant's husband appealed against a medical board's adverse decision on the claim and, on 2 April 1981, the medical appeal tribunal set aside the decision of the board, stating their reasons and findings, omitting preliminary detail, as follows -

> "Mrs Goldfarb put in a document "Summary of Evidence" now marked "SEF 1" which included supporting evidence and in particular a statement from Dr D R S Leslie dated 23 March 1981. The claimant was then observed to walk in the corridor and up some stairs in the Tribunal building without assistance and she attempted to leave the building by herself and rush outside towards Talbot Street, Nottingham. There is still a possibility of some improvement but we find the claimant is virtually unable to walk at the presefit time. We make the award from 29 October 1979 to 28 October 1983."

5. Leave to appeal to the Commissioner was given on 14 August 1981 by the medical appeal tribunal, differently constituted, who stated their reasons as follows -

> "We have carefully considered the Commissioners' decisions in C.M. 1/81 and C.M. 2/81 (both unreported). The bizarre walking style of the claimant was considered to be a consequence of encephalitis which was interpreted under the amended regulations as being a physical cause. The uncontrolled walking behaviour of the claimant was such as, in our opinion, to constitute a virtual inability to walk."

6. The grounds of appeal submitted on behalf of the Secretary of State are that -

> "1. There was no evidence to support the Tribunal's finding that the claimant is virtually unable to walk;
>
> 2. No Tribunal properly instructed as to the law could have found that the claimant is virtually unable to walk;
>
> 3. The Tribunal misdirected themselves as to the construction of regulation 3(1)(b) of the Mobility Allowance Regulations 1975 as amended by the Mobility Allowance Amendment Regulations 1979 (see Commissioners' Decisions C.M. 1/81 and C.M. 2/81 (both unreported))."

7. The tribunal did not record a finding that the disablement was due to a physical cause, although that can be inferred from the reference to Dr Leslie's statement. Mr Canlin did not contend that the claimant's condition was not the result of physical disablement, and I think rightly so, since the medical evidence clearly shows a physical cause. He submitted that it was clear from the tribunal's reasons that they took into account as a relevant factor the claimant's inability to control her walking movements which, he contended, is not a relevant factor in determining virtual inability to walk in accordance with regulation 3 of the Mobility Allowance Regulations 1975, as amendeded by the Amendment Regulations 1979.

8. Regulation 3(1) of the said regulations, as amended, and as relevant to the circumstances of this case, is as follows -

> "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) ...".

9. Mr Canlin cited from Decision R(M) 3/78 in which it was held that "walk" in the context of regulation 3 did not require a reference to environmental circumstances. It was stated in paragraph 12 that "virtually unable to walk" could have a wider meaning than an ability to walk which is minimal and might cover a person who had the physical capacity to walk but might be inhibited in some way from being able to walk. That decision was given before regulation 3(1) was amended and should be read accordingly. Mr Canlin also cited Decision C.M. 1/81 (not reported) in paragraph 5 of which the learned Commissioner drew attention to the difference between the two versions of regulation 3(1) before and after the amendment. He expressed his opinion on the interpretation of the phrase "severe discomfort" and stated that it would not include epileptic fits, the screaming attacks of an autistic child or the refusal to walk of a mongol child. In Decision C.M. 2/81 (reported as Decision R(M) 1/81), the learned Commissioner explained, in paragraph 9, the words "without severe discomfort" as follows -

> "Shortly explained, the correct construction gives to the words "without severe discomfort" in context the sense of requiring that you are to look only at what are the limits (if any) of the claimant's ability to walk out doors <u>without</u> severe discomfort, be the limitation(s) in point of distance, speed, length of time or manner, and ignore any extended outdoor walking accomplishment which the claimant could or might attain only <u>with</u> severe discomfort."

It appears from paragraph 13 of that decision that the learned Commissioner who decided Decision C.M. 1/81 accepted that construction.

10. Mr Canlin also cited Decision C.S.M. 1/81 (reported as Decision R(M) 2/81) which, in the characteristic manner of representatives of the Secretary of State and of the chief insurance officer, he acknowledged was against his submission. In that case the important point was that, although the claimant was able to make

the movements required in the activity of walking, he lacked the ability to control his movement in respect of any direction because of physical impairment due to the effects of a head injury. In paragraph 7, the learned Commissioner stated that although, as the medical appeal tribunal pointed out, the claimant's legs were capable of making the movements required in the activity of walking, he was in fact unable to walk to any place to which he desired to go without help and guidance from another person. He agreed with the tribunal that in those circumstances the claimant was to be regarded as being unable to walk within the relevant statutory provisions. Mr Canlin submitted that that appeal was wrongly decided.

11. The circumstances of that case are not dissimilar from those of the present case, in which Dr Leslie stated that the claimant's infantile and emotional urges upon locomotion - "is effectively so counter-productive that she fails to conform with the requirements of her situation - hence she has given rise to major problems of control and management due to co-ordinated but intellectually uncontrolled movements of her legs, which either take her where she should not go, or fail to take her where she should go." He added that there is thus no question as to whether she can walk or not.

12. Mr Canlin submitted that no reasonable tribunal properly instructed in the law could have reached their decision and that the only unusual factor recorded by the tribunal as a finding of fact was the claimant's attempt to leave the building by herself and rush outside towards a main street. He submitted that the regulation did not permit the tribunal to take account of the claimant's bizarre and uncontrolled walking behaviour.

13. Mrs Goldfarb made a cogent submission supporting the decision of the tribunal. She referred to passages from Decision C.M. 1/81, R(M) 1/81 and C.S.M. 1/81. She cited a decision on Commissioner's file C.M. 54/80, which covers other matters, but, in paragraph 12 of which, the learned Commissioner commented on Decisions R(M) 2/78 and R(M) 3/78 and concluded that a decision is not erroneous in point of law by reason only of its reference to the objective purpose of walking in general. Mrs Goldfarb contended that it is relevant in the application of regulation 3(1)(b), as amended, to take account of inability to direct steps and to consider the general purpose of walking and that it was not wrong to consider the erratic nature of the claimant's walking, to which the tribunal specifically referred by reference to Dr Leslie's statement.

14. The tribunal decided that the claimant's physical condition as a whole was such that she is not unable to walk but is virtually unable to walk. Their reasons and findings are far from clear but are not such as to constitute an error of law on that account. It would appear that the mention of the incident of attempting to leave the building and rush outside was merely to confirm the opinion of Dr Leslie. The tribunal have not, however, stated how the claimant's case fell within regulation 3(1)(b), as amended. It is not satisfactory when a differently constituted medical appeal tribunal, in granting leave to appeal, purport to supplement the reasons of a

tribunal of which all were not members. It appears that the chairman and one member were the same as on the original tribunal.

15. In my judgment, bizarre or erratic behaviour do not constitute inability to walk provided legs and feet are capable of effecting walking. It was not decided by the tribunal in this appeal that it did but, in Decision C.S.M. 1/81 (R(M) 2/81), the tribunal did decide that the claimant was unable to walk without any reference to virtual inability to walk. There can be no doubt that the claimant is not unable to walk but the mobility she can achieve by walking is of no practical use to her. She has to be controlled and guided. This is not a case of the onset of some condition whilst walking, such as an epileptic fit or a possible heart attack or the intervention of a condition or symptom during the course of walking. The claimant is at all times affected, due to brain damage, by inability to control her impulses and to direct her walking. I respectfully agree with the construction of regulation 3(1)(b) as decided in Decision R(M) 1/81, cited above. In my opinion, Mrs Goldfarb's submission, which I have summarised in the final sentence of paragraph 13 above, is broadly correct. Mr Canlin was inclined to agree that the claimant's ability to walk might cause her severe discomfort. In my judgment, however, applying the principle of Decision R(M) 1/81, the claimant's ability to walk out of doors is so limited as regards the manner in which she can make progress on foot, either with or without severe discomfort, that she is virtually unable to walk. Although the tribunal did not make their reasons as clear as they might have done, I conclude that their decision is not erroneous in law.

(Signed) J S Watson
Commissioner

Date: 27 April 1982

Commissioner's File: C.M. 90/1981
DHSS File: B. 51023/292