CPAG ★ 69/94

MR/TEMP/3 Commissioner's File: CM/113/1991

SOCIAL SECURITY ACTS 1975 TO 1990

SOCIAL SECURITY ADMINISTRATION ACT 1992

CLAIM FOR MOBILITY ALLOWANCE

DECISION OF THE SOCIAL SECURITY COMMISSIONER

[ORAL HEARING]

1. The claimant's appeal is allowed. The decision of the London (South) Medical Appeal Tribunal dated 8 August 1990 is erroneous in point of law. Under section 48(5) of the Social Security Administration Act 1992, as modified by regulation 24(13) of the Social Security (Introduction of Disability Living Allowance) Regulations 1991, I set that decision aside and refer the case to an adjudication officer for determination.

2. At the oral hearing of her appeal, the claimant was represented by Ms Helen Mountfield of Counsel and the Secretary of State was represented by Mr James Latter of Counsel. I am very grateful to both of them for their detailed submissions on this case.

3. This appeal concerns a claim made for mobility allowance five years ago on 12 June 1989. The material question has at all times been whether the claimant was virtually unable to walk within regulation 3(1)(b) of the Mobility Allowance Regulations 1975. At the time the claim was made, regulation 3(1) provided:-

> "A person shall be treated, for the purposes of section 37A [of the Social Security Act 1975], as suffering from physical disablement such that he is either unable to walk or virtually unable to do so only if his physical condition as a whole is such that, without having regard to circumstances peculiar to that person as to the 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) the exertion required to walk would constitute a danger to his life or would be likely to lead to a serious deterioration in his health."

4. The claimant, who has bilateral talipes and anterior horn disease, had made two earlier claims for mobility allowance. In 1985, neither the adjudication officer nor the medical board considered that the claimant was virtually unable to walk and, as she did not appeal against the medical board's decision, the claim was unsuccessful. On her second claim, the adjudication officer had awarded mobility allowance for two years from 2 September 1987. The present claim was therefore a renewal claim. Neither the adjudication officer nor the medical board considered that the claimant was virtually unable to walk. The medical board assessed her walking ability by describing the walking test that they had conducted. The claimant appealed to the medical appeal who confirmed the medical board's decision and held that the claimant had not been unable or virtually unable to walk since 2 September 1989. Their reasons were brief:-

> "We adopt the findings of the A.M.A. of 7.12.89. Walking Test. She covered outside 120 yards in three and a quarter minutes stopping because of discomfort at 60 yards and her assertion of pain. She walked at a slow pace with a slightly ataxic gait. She conversed throughout. Her balance was satisfactory and she was unsupported. We accept that there was some discomfort but not in our opinion severe so as to bring her within the regulations. She does not satisfy Regulation 3(1)(a), 3(1)(b) or 3(1)(c)."

The claimant now appeals against the tribunal's decision with the leave of a Commissioner given three years ago.

5. The principal reason for the inordinant delay in the determination of this appeal is that there has been some disagreement between Commissioners as to the approach medical appeal tribunals should take to renewal claims for mobility allowance. I directed an oral hearing in this case because the Secretary of State wished to argue that my decision in CM/140/92 was not consistent with the decision of the Court of Appeal in Kitchen and Ors v. Secretary of State for Social Security (The Times, September 14, 1993). CM/140/1992 was a decision given without the benefit of oral argument and, indeed, I had no written submissions directed specifically to the decision of the Court of Appeal in Kitchen and Ors. In CM/140/1992, I followed a decision of a Tribunal of Commissioner in CM/205/88, holding

that that decision was not inconsistent with any decision of the Court of Appeal. A decision of a Tribunal of Commissioners is, of course, binding on a single Commissioner unless it is inconsistent with higher authority. In dealing with the possible conflict between CM/205/88 and Kitchen and Ors, I said:-

> "18. It is important to bear in mind that the Tribunal in CM/205/88 were essentially concerned with two practical problems. One is that the adjudicating authority must consider a claimant's medical examinations conducted at specific points in time which presents a risk that there will not be a true assessment having regard to fluctuations in a claimant's condition. It is therefore not enough for a tribunal to record their findings based on their observation of a walking test or on the view expressed in a medical report based on one medical examination, and then to record a conclusion which is not inconsistent with those findings. This is the basis of the decision of the Court of Appeal in Kitchen and Ors. The particular error noted in the Moran and Begum decisions was that they "do not deal with the dates to which the findings were related" even though they did "make it sufficiently plain to the reader why the tribunal concluded that on the date of the examination the appellants were not virtually unable to walk'". It seems to me that, in considering the whole period at issue, a tribunal are bound to take account not only of their own observations and of the claimant's evidence but also of the existing objective evidence from earlier claims insofar as they feel that that may be of assistance. The evidence in respect of earlier claims will be of little assistance if the claimant is suffering from a condition where improvement is likely but it may be of greater assistance if the claimant's condition is one where improvement would not usually be expected. In considering its relevance, the tribunal must necessarily give some thought to the relationship between their findings and the medical history as a whole, as was suggested in CM/205/88, and should indicate their conclusion in their reasoning. I therefore take the view that CM/205/88 is, on that issue, entirely consistent with, and indeed supported by, the decision of the Court of Appeal in Kitchen and Ors.
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> 19. However, the other practical problem noted in CM/205/88 is not touched upon by the Court of Appeal in Kitchen and Ors. The concept of virtual inability to walk is not precise. Given certain findings of primary fact, adjudicating authorities may legitimately reach different conclusions as to whether claimants are virtually unable to walk. It is liable to give rise to a feeling of injustice if a claimant who has been awarded a benefit then loses it when there has been no change in the extent of his or her disability. Therefore it was held in CM/205/88, following R(A) 2/83, that an adjudicating authority dealing with a continuation claim should give "careful consideration .... to the question whether evidence about developments subsequent to the award in decision really warrants ... a

different conclusion". The clear implication of the decision is that, even though a tribunal's findings are such that they would usually decide against the claimant, if they accept that there has probably been no change in the claimant's condition since an earlier decision to award benefit, they should only decide against the claimant if they take the view that to do otherwise would be perverse, in the sense that no adjudicating authority, properly instructed as to the law, should make that decision. An adjudicating authority may complain that that must lead to inconsistency in their decision making. However, that inconsistency is no greater than the natural inconsistency existing between different adjudicating authorities. Perfect consistency between claimants may be desirable in the interests of justice but is unattainable. It is however possible to strive towards consistency in the decisions affecting any individual claimant. As the Tribunal held in CM/205/88, that approach has clear implications for the way reasons should be recorded by a tribunal because the reasons must be such as to show that the tribunal has addressed its mind to all the issues in a case.

20. Is there anything in the judgment of Neill LJ in Kitchen and Ors to suggest that R(A) 2/83 and CM/205/88 were wrongly decided insofar as they stress the importance of consistency between decisions involving an individual claimant? I do not think so. There is nothing in Neill LJ's judgment to suggest that the argument for consistency was ever advanced before the Court; far less that it was considered and rejected. It might be argued that the conclusion of the Court of the Appeal that "the decisions would have been unassailable had the tribunal set out and answered the various questions which the mobility allowance regulations required them to address" suggests a rejection of the submission on behalf of the claimants in Moran and Begum that some explanation should have been given for the tribunal's differing from earlier adjudicating authorities. However, there is no express rejection of that submission and the tenor of the general principles set out by the Court suggests to me that no implicit rejection was intended either. Most important is the first of the passages from the judgment of Neill LJ that I have set out in paragraph 16 above.

21. If the need for consistency is a relevant issue before a tribunal, it then follows that a tribunal's reasons should show that they have considered it properly. In Kitchen and Ors, the Court adopted as a general principle the view expressed by Lord Donaldson MR in Regina v. Civil Service Appeal Board ex parte Cunningham [1992] ICR 816, 828:

> "Fairness requires a tribunal such as the board to give sufficient reasons for its decisions to enable the parties to know the issues to which it addressed

its mind and that it acted lawfully."

A similar expression of the purpose of reasons is to be found in Baron.

> 22. I therefore conclude that the guidance given in CM/205/88 has not been the subject of disapproval by the Court of Appeal and I should follow it. I should however stress that, although a tribunal dealing with a continuation claim or a reassessment of disablement following a provisional assessment) should explain why its conclusions differ from those of earlier adjudicating authorities, their decision will not be erroneous in point of law merely because they fail to do so in express terms. If, as in Viscusi and Braithwaite, it is possible to infer the explanation from the tribunal's other reasoning, that would be enough."

The distinction between the point dealt with in paragraph 18 (the relevance of evidence relating to earlier claims) and the point dealt with in paragraphs 19 to 21 (the desirability of consistency) is important. The two points raise different issues.

The relevance of evidence relating to earlier claims

6. Ms Mountfield, for the claimant, submitted that, because this was a renewal case, the medical appeal tribunal should have shown in their reasoning that they had considered the medical report upon which the adjudication officer had based the 1987 award for mobility allowance and should have given reasons for reaching a different conclusion. Mr Latter did not attack paragraph 18 of CM/140/1992. However, he submitted that each case must be taken on its merits and that in this particular case the tribunal has said all that was necessary in their decision. He submitted that the tribunal had not erred in law because it was inconceivable that the tribunal had not been aware of the 1987 medical report and that they were not bound to refer to it as it was not relevant in the circumstances of this case.

7. On the broader issue, Mr Latter submitted that renewal claims were not different from other claims. The tribunal had to deal merely with the period to which the claim related and were not obliged to refer to earlier decisions. He submitted that guidance given in CM/205/88 had been wrongly elevated to a rule of law and he referred to a sentence in paragraph 13 of that decision where the Tribunal of Commissioners said:-

> "It is necessary that a tribunal explain to a claimant why they have come to their conclusion and that in our view means that they must explain in what way and why that conclusion differs, in cases where it does differ, from earlier conclusions ..." ("Mr Latter's emphasis").

He submitted that that was inconsistent with the far more general

guidance given in Kitchen and Ors where Neill LJ said:-

> "The decision should record the medical question or questions which the tribunal is required to answer. Provided the questions are set out and the answers are directed to the questions it should then be possible for the parties to know the issues to which the tribunal have directed themselves."

The House of Lords have been even more diffident in explaining the standard of reasoning required for compliance with a statutory duty to give reasons. Ms Mountfield referred me to save Britain's Heritage v. No. 1 Poultry Ltd [1991] 1 WLR 153 where Lord Bridge of Harwich said at page 167:-

> "The difficulty arises in determining whether the reasons given are adequate, whether, in the words of Megaw J, they deal with the substantial points that have been raised or, in the words of Phillips J in Hope v. Secretary of State for the Environment, 31P. and C.R. 120, 123, enable the reader to know what conclusions the decision maker has reached on the principle controversial issues. What degree of particularity is required? It is tempting to think that the Court of Appeal or your Lordship's House would be giving helpful guidance by offering a general answer to this question and thereby 'setting the standard' but I feel no doubt that the temptation should be resisted, precisely because the court has no authority to put a gloss on the words of the statute, only to construe them. I do not think one can safely more in general terms than that the degree of particularity required will depend entirely on the nature of issues falling for decision."

On the general principle, Ms Mountfield submitted that in renewal cases the "issues" were in practice different and wider than in other cases and that therefore compliance with the broad guidance of both Neill LJ and Lord Bridge does in fact require a tribunal to deal with more issues than it would on an initial claim.

8. It seems to me that there is not much distinction in substance between the contentions of Mr Latter and Ms Mountfield. Any distinction is really one of emphasis. I do not think that the tribunal in CM/205/88 meant to suggest that evidence from previous claims would always be relevant. The sentence to which Mr Latter took exception must be put in context. The Tribunal of Commissioners said:-

> ".... we have come to the conclusion that there is nothing to warrant the view that a claimant coming before a tribunal on a renewal application is essentially in any different a position from a claimant coming on an original application. That necessarily negatives any question of a presumption in his favour. But, of course, he will have a greater prior history of medical examinations and of views expressed upon his condition by examining practitioners, and, it may be, by medical boards. Cases will so vary in

their circumstances that we feel it undesirable to do other than lay down rather general guidelines. It is necessary that a tribunal explain to a claimant why they have come to their conclusion and that in our view it means that they must explain in what way and why that conclusion differs, in cases where it does differ, from earlier conclusions, that is those upon a prior claim, or as it may be claims, which form a sequence with the current claim. In short it is necessary for the tribunal to relate its findings to the medical history as a whole as put before them."

The Tribunal of Commissioners were concerned that a medical appeal tribunal should at least consider the relevance of evidence relating to earlier claims. It follows that, in practice, that is likely to be an "issue" in a renewal case and should, in principle, be dealt with in the tribunal's reasons for decision. I did, however, stress in paragraph 22 of CM/140/1992 that a tribunal's decision will not be erroneous in point of law merely because they failed to explain in express terms why they have differed from an earlier decision. If it is possible to infer the explanation from their other reasoning - or, I would add, the general context of the case - that is enough. Thus a failure to mention evidence on previous claims which is clearly irrelevant to the present claim will not render the decision erroneous in point of law. In practice, as Mr Latter submitted, it is necessary to look at the facts of each case if it is alleged that a tribunal has erred in failing to explain why they have reached a different conclusion from an authority determining an earlier claim.

9. When one looks at the circumstances of this case, the clinical findings upon which the 1987 decision was based do not appear markedly different from those of the 1989 adjudicating medical authority which were adopted by the tribunal. It was the 1987 assessment of walking ability that was different. The examining medical practitioner said:-

> "She was just about able to walk 100 yards but the quality of her walking was very poor, the gait and directional stability erratic. She cannot use walking aids because of the condition of her arms."

In contrast. in 1989, the examining medical practitioner whose opinion was obtained by the adjudication officer said that the claimant could walk with a slight limp but that she walked freely and he estimated that she could walk at least 100 yards without severe discomfort. No outdoor walking test was carried out and no explanation was given for that omission. In her letter of appeal, the claimant said that "some days I can hardly walk many yards at all". Before the adjudicating medical authority, she said that "some days I am able to walk about 100 yards but other days my feet are so painful I can't manage that distance". The adjudicating medical authority described the walking test as follows:-

> "She walked 180-200 yards at near normal pace. She was

experiencing some pain at the conclusion of the test but was able then to go on to the test on the stairs. Whole test 4-5 minutes duration."

As Ms Mountfield pointed out, the medical board did not actually say that the whole 180-200 yards was managed without severe discomfort. In her letter of appeal, the claimant said:-

> "Since I have been receiving this allowance it has meant that I can lead an independent life.
>
> My muscle disability makes me feel very tired <u>some days</u> so much, so that without my car I wouldn't be able to get around." (My emphasis.)

In her evidence to the tribunal, the claimant's representative said that operations the claimant had had before mobility allowance was first awarded had decreased the frequency of unbearable pain across her ankles "but she does still have it several times a week" and that she had particular difficulties in the mornings.

10. In CM/361/1992, the Commissioner said:-

> "There is nothing strange in a claimant's condition varying from day to day. The medical authorities are perfectly well aware of that, and assess the claimant's condition on that basis. If at the time that they conduct their test, there is any assertion that the claimant's condition is atypical, they must, of course, bear that in mind and deal with it. In the present case there was no such suggestion."

In my view the variation in the present claimant's condition was sufficiently raised as an issue before the medical appeal tribunal even though it was not specifically suggested that the claimant's condition was atypical at the time the tribunal conducted their walking test. The fact that the examining medical practitioner had in 1987 made a different assessment of the claimant's walking ability was but one piece of evidence on that issue, although it was of particular weight because it was independent evidence. The tribunal have not made any comment on the issue at all. It is sufficiently plain to the reader why the tribunal concluded that on the day of the examination by the tribunal the claimant was not "virtually unable to walk". It is probably plain to the reader why the tribunal concluded that on the day of the examination by the medical board she was not "virtually unable to walk" although there is force in Ms Mountfield's point that the medical board did not deal adequately with the extent to which the claimant could walk "without severe discomfort". However, the tribunal have not given any indication that they considered the claimant's ability to walk over the whole period under consideration and the circumstances of this case called for such an indication because the variation in her ability to walk had been made an issue in the case. On that ground, I hold the tribunal's decision to be

erroneous in point of law.

11. Ms Mountfield submitted that evidence relied upon by an adjudication officer or other adjudicating authority was of more importance than other evidence and should always be dealt with specifically in any decision on a renewal claim. In my view that can be correct only if the desirability of consistency is an issue on a renewal claim; otherwise such evidence is not to be treated differently from any other evidence. Nevertheless, in practice evidence relating to earlier claims is likely to be regarded by a claimant as relevant to a renewal claim and should be dealt with for that reason.

The desirability of consistency

12. Ms Mountfield relied on paragraphs 19 to 21 of CM/140/1992 and submitted that the desirability of consistency is an issue on any renewal claim.

Mr Latter, on the other hand, submitted that paragraphs 19 to 21 of CM/140/92 could not stand alongside Kitchen and Ors and that part of my decision was therefore wrong. On the view that I take of the present case, it is not strictly necessary for me to deal with this issue. However, I did not receive argument on it in CM/140/1992 and I have received very full argument in the present case. In view of its general importance, I think that it is right that I should express a view on this issue in the light of the argument.

13. Mr Latter submitted that, if it is necessary for the issue of consistency to be dealt with in every case, it necessarily follows that a tribunal must in every renewal case explain why the claimant is no longer eligible for the allowance. I think that that is correct (subject to the qualification that a tribunal will not err in failing to deal with that matter expressly in an obvious case). Mr Latter then submitted that a submission on behalf of the appellant in Kitchen and Ors to the effect that a tribunal must "explain, in cases where the applicant has been in receipt of the relevant allowance previously, why the applicant was no longer eligible for the allowance" had been rejected by the court. He accepted that there was no express rejection of the argument but argued that, if the court had accepted the argument, they would have said so in clear terms. He further submitted that the argument outlined in paragraph 19 of CM/140/1992 was inconsistent with Regina v. National Insurance Commissioner , Ex Parte Viscusi [1974] 1 WLR 646 (also reported as an Appendix to R(I) 2/73), upon which the court in Kitchen and Ors clearly placed some reliance.

14. I do not consider that Viscusi is really of any relevance on this issue. It is true that the court in that case "emphasised that decisions of medical authorities on disablement claims .... were by their nature provisional and applied only to the period specified" (to use the words of Neill LJ in Kitchen and Ors), but the same approach was adopted in CM/205/88. It does not follow that the decision in respect of an earlier period

may not have some relevance to a later period and the issue of consistency arising in mobility allowance cases, due to the imprecision of the statutory test, did not arise in Viscusi. In Viscusi a medical appeal tribunal had differed from earlier tribunals on the issue of causation, but their reasons for doing so were perfectly clear even though they were not spelt out in their decision. In any event, as Ms Mountfield submitted, Neill LJ said:-

> "A decision on a question of causation may pose particular difficulties when one is examining the adequacy for the decision. In some cases it may be sufficient for the tribunal to record that it is not satisfied that the present condition was caused by the relevant trauma. Where, however, a claimant has previously been in receipt of some benefit or allowance (particularly if the benefit or allowance has been paid over a long period) and there is no question of malingering or bad faith it seems to me that the tribunal should go further than merely to state a conclusion. If one accepts that the underlying principle is fairness the claimant should be given some explanation, which may be very short, to enable him or his advisors to know where the break in the chain of causation has been found. Thus it may well be that the claimant will wish to reapply and for this purpose fairness requires that, if possible, he should be told why his claim has failed."

Thus, in Kitchen and Ors, the Court of Appeal was making it plain that in the sort of situation that arose in Viscusi a tribunal should give reasons for differing from decisions made in respect of earlier periods. One is therefore brought back to the general question whether the desirability of consistency is an "issue" requiring the giving of reasons in all renewal cases.

15. I do not think that it is right to say that the Court of Appeal implicitly rejected the appellant's argument in respect of renewal claims. In my view, the court merely intended that such claims should be dealt with in the context of their general guidance. They expressed no view as to what were the relevant "issues" in renewal claims. I would reverse Mr Latter's argument. Had the court intended to hold a line of Commissioners decisions (R(A) 2/83, CM/205/88, R(A) 2/89) to be wrong, they would have said so in clear terms. In a written submission on behalf of the Secretary of State, dated 18 February 1994, reliance was placed on Neill LJ saying that the medical appeal tribunal decisions in Moran and Begum would have been "unassailable" had the tribunal set out in answer to various questions which the Mobility Allowance Regulations required them to address. However, Neill LJ did not attempt to set out all the issues which the tribunal were bound to address. I do not consider that those can be limited only to the specific matters referred to in the regulations. It is trite law that tribunals are bound to deal with specific factual contentions advanced by the parties. In my view, the court intended that tribunals should identify the relevant "issues" in the light of both regulations and relevant case law.

16. My conclusion is that renewal cases concerning mobility allowance are like causation cases. There are no reasons of high principle why a decision should be related to earlier decisions. On the other hand, they almost invariably throw up "issues" which require earlier decisions to be considered and reasons will be inadequate if they do not show such consideration, either expressly or by implication. CM/205/88 is authority, binding upon me, for the proposition that the desirability of consistency is often an "issue" before a tribunal on a renewal claim, so that a tribunal's decision must show that they have considered it. In the present case, the medical appeal tribunal failed to do so. Their decision is therefore erroneous in point of law on that ground also.

Conclusion

17. The claimant's appeal is allowed on the ground identified in paragraphs 10 and 16 above. Her case must now be considered by an adjudication officer. The fact that I have allowed this appeal is not to be taken as a suggestion that I consider that the adjudication officer should determine the case in any particular way. I hope that the adjudication officer will be able to deal with the case quickly, in view of the delay, but I appreciate that some up-to-date evidence will be required from the claimant.

Name: **M Rowland**
Commissioner

Date: **30 June 1994**