JGM/MP

CM 137/1982 (42)

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: Birmingham

Original Decision Case No:

1. My decision is that the decision of the medical appeal tribunal dated 10 June 1982 is erroneous in point of law in that there is not a sufficient statement of the tribunal's findings on material questions of fact to satisfy regulation 23(2) of the Social Security (Determination of Claims and Questions) Regulations 1975. I set the decision aside accordingly, though I do so with considerable reluctance because as it appears to me the matter was presented to the tribunal on an erroneous basis and a tribunal reconsidering the matter will not be concerned with evidence of the deterioration in the claimant's condition after the date of the original claim, on which the claimant himself placed emphasis in appealing to the medical appeal tribunal.

2. The claimant, who died on 12 October 1981, and whose appeal is being continued by his widow, made a claim for mobility allowance which was received by the Secretary of State for Social Services on 22 May 1980. He had made a previous unsuccessful claim in 1977. The date of the receipt of this second claim is of high significance because section 37A(7) of the Social Security Act 1975 provides that except so far as may be provided by regulations (I know of no excepting regulation that would help the claimant) 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. This means that if a person does not satisfy the conditions of the allowance at the date that the claim is received he cannot be awarded mobility allowance on that claim even if his condition deteriorates. Conversely if he does satisfy them at that date he will be entitled to the allowance for whatever period it is awarded on the claim even if his condition improves, unless (which seems doubtful; see decision on file C.M. 81/81 (not reported)) the decision can be reviewed and revised. In any case I do not think that a decision that the conditions for an allowance were not satisfied (which is in no sense a continuing decision) can be reviewed on the ground of subsequent deterioration (cf. Decision R(A) 2/81).

3. A person who relies exclusively on deterioration has to make a fresh claim rather than appeal. By appealing he retains his chance of an award back to the date of the earlier claim, but loses the chance of relying on deterioration. It is regrettable that the claimant was not advised of the alternatives or indeed of the possibility of operating the two courses concurrently. As it is, the only function of the medical appeal tribunal to whom this matter is now referred is to consider whether the claimant satisfied the medical conditions for an award of mobility allowance as at 22 March 1980 and (if he did) for how long he was then likely to do so.

4. The present claim was referred in the first instance to a medical practitioner, who expressed the view that the claimant was neither unable or virtually unable to walk. A medical board on 13 October 1980 reached a like conclusion. The matter came before a medical appeal tribunal for the first time on 13 April 1981 when the matter was adjourned for a report from the surgeon with experience of the claimant's case. The claimant died before the hearing was resumed. At the resumed hearing on 10 June 1982 the tribunal confirmed the decision of the medical board. It is fair to say that in confirming it they did give consideration to the possibility of the claimant having deteriorated subsequently to the claim, a possibility that I hold it to have been unnecessary for them to entertain on the appeal.

5. The first ground on which the claimant's widow now appeals to the Commissioner is that there was a change in the constitution of the tribunal between the two hearings and that it is not recorded that there was a complete rehearing. It does not appear to be suggested that there was not a complete rehearing, but merely that this is not recorded. The authorities show that if a matter is resumed after there has been a partial hearing (not merely a formal decision to adjourn without more) then unless the claimant and, I think, the Secretary of State consent there must be a rehearing from the start, and that a claimant's consent to a change ought not necessarily to be inferred from the fact that he made no objection at the time, as he may not have understood that he had any right to object. In the present case no objection was taken at the time, and the claimant at the first hearing and his widow at the second hearing were represented by the same welfare rights worker. I should in these circumstances hesitate to set the decision aside on the ground of change in the tribunal in the absence of clear evidence that there was not a rehearing from the start. As I am setting the decision aside on a different ground I need not go into this matter further.

6. It is also submitted on behalf of the claimant's widow that the tribunal gave no consideration to and made no finding of fact as to the date at which the claimant's condition had deteriorated. On the view that I have above expressed as to the effect of section 37A(7) this was a matter that they had no need to decide. And the fact that the tribunal were not aware of this point does not mean that their decision was erroneous in point of law.

7. It was however for the tribunal to decide whether the claimant was or was not in terms of regulation 3(1) of the Mobility Allowance

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Regulations 1975 as amended in 1979 unable or virtually unable to walk at 22 March 1980. This was probably not a case of actual inability to walk but, if anything, a case of either virtual inability to walk within regulation 3(1)(b) or of so-called constructive inability to walk within regulation 3(1)(c). There were in relation to regulation 3(1)(b) no findings of fact as to among other things the distance which the claimant could walk or could walk without "severe discomfort", though these matters were in my judgment sufficiently put in issue. It follows in my judgment from the recent decision of a Tribunal of Commissioners in the case on file C.M. 4/82 and associated cases to be reported as R(M) 1/83 that the decision did not comply with regulation 23 referred to in paragraph 1 above. And I set the decision aside. The matter should be referred to a fresh tribunal which in accordance with the normal practice should be differently constituted from that which gave the decision set aside.

(Signed) J G Monroe
Commissioner

Date: 1 March 1983

Commissioner's File: C.M. 137/1982
DHSS File: