MOBA – Renewed Claim – Date Desirability of Consideration

MR/FC/1

69/93.

Commissioner's File: CM/140/1992

SOCIAL SECURITY ACTS 1975 TO 1990

SOCIAL SECURITY ADMINISTRATION ACT 1992

CLAIM FOR MOBILITY ALLOWANCE

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Name: Nancy Counter (Mrs)

Appeal Tribunal: Plymouth

Case No: 30600/82

1. This appeal is allowed. The decision of the Plymouth medical appeal tribunal dated 4 April 1991 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 the decision aside and refer the case for determination by an adjudication officer.

2. The claimant suffers from arthritis in her right hip which limits her ability to walk. She had a series of awards of mobility allowance from 12 May 1981 until 11 November 1989. Examining doctors who saw her in 1981 and 1982 seem to have limited the period covered by their opinion that she was virtually unable to walk because they thought that her walking ability was likely to improve. In 1983 the doctor who saw her thought that her walking ability was likely to deteriorate, in 1985 the opinion was that her walking ability was unlikely to change and in 1986 the opinion was that her walking ability was likely to deteriorate but that that depended on whether she had surgery, there having been some discussion about the possibility of her being given an artificial hip.

3. The doctors who examined her in 1981, 1982, 1983 and 1985 all considered that the claimant was virtually unable to walk within what was then regulation 3(1)(b) of the Mobility Allowance Regulations 1975 and the adjudication officer clearly accepted that advice because mobility allowance was awarded. The doctor who saw her in 1986 was not of the same opinion but it seems that the adjudication officer did not accept the advice on this occasion because mobility allowance was awarded for a further 3 year period.

4. Shortly before that award was due to expire, the claimant

made a further claim and, on 25 August 1989 she was examined by yet another doctor. He, like the doctor who had last examined her, was of the view that she was not virtually unable to walk and it appears that this time the adjudication officer accepted the opinion because mobility allowance was not awarded. The claimant appealed against the adjudication officer's decision on the medical questions. The medical board who examined her on 5 December 1989 were also of the view that none of the medical conditions for entitlement to mobility allowance were satisfied and the claimant appealed against that decision to the medical appeal tribunal. The tribunal adjourned the first hearing in order to obtain a report from a consultant orthopaedic surgeon, Mr G.M. Bulman who had had care of the claimant. Having obtained the report, the tribunal considered her case on 4 April 1991 and confirmed the decision of the medical board. They adopted the clinical findings of the consultant and also recorded their own observations as follows:

> "We observed the claimant walking indoors and out of doors when in total she covered just over 100 yards, some 80 yards of which were out of doors. She held a stick in her left hand and walked at a reasonable pace. She also held one of the medical member's arms, for part of the time. She indicated that she did not want to go further.
>
> The appellant today walked just over 100 yards with some discomfort but the tribunal was of the opinion that within the distance covered the discomfort was not severe. She was able to converse the whole time."

The tribunal's reasons for confirming the decision of the medical board were expressed as follows:

> "This tribunal is satisfied that although the appellant suffers discomfort she can walk at a reasonable pace for distances of 100 yards without severe discomfort. She has been able to do this today, and it appears from Mr Bullman's [sic] report that this would be likely to be her general performance. In the circumstances, it is felt that she does not therefore, satisfy Mobility Allowance Reg. 3(1)(b) and it [sic] is not virtually unable to walk. The tribunal has gone on to consider Mobility Allowance Regulation 3(1)(c), but it is apparent from Mr Bullman's [sic] report, that he has advised walking within her own limitations which, it is suggested, is a distance of about 100 yards, and that within that sort of distance, she will not suffer a deterioration in health. Accordingly, she does not satisfy Mobility Allowance Regulation 3(1)(c)."

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

5. The claimant's ground of appeal is -

"That the tribunal made the decision supported by no, or insufficient, evidence in that the medical appeal tribunal failed to examine me to see that I was in severe discomfort following a short walk in which I was aided by the members of the tribunal."

I reject that ground of appeal insofar as it complains of a lack of medical examination. It was for the tribunal, as an expert body, to consider whether it was necessary further to examine the claimant after the walking test to enable them to form a view as to whether she was in severe discomfort. They were not bound to carry out such an examination if they felt able to answer the question without one.

6. However, the ground of appeal does draw attention to another point. During the walking test, the claimant held the arm of one of the medical members for part of the time. In the written submission dated 28 May 1992 made on behalf of the Secretary of State to me, there is the following passage:

> "It is submitted that MAT's findings should refer to physical support if given and explain how it relates to the claimant's unaided walking ability. The tribunal have recorded the point and drawn conclusions on the test as a whole in their reason for a decision that they are satisfied that she could walk at a reasonable pace for distances of 100 yards without severe discomfort. In drawing this conclusion they have considered the help given by the member. It is for the MAT to set the nature and extent of any walking test in their expertise in order to determine the medical questions. However if the Commissioner would like to obtain the comments of the MAT chairman via the regional chairman on this point the Secretary of State's representative would seek leave to make further observations on such comments when they are available."

It is not necessary to obtain further comments on the tribunal in this case because, unlike in R(M) 1/89, there is no dispute as to what happened. However, in paragraph 17 of R(M) 1/89, the Tribunal of Commissioners held:

> "As a further reason for allowing the appeal we find the omission from their record of any mention of the part played by the second examiner in the walking test and of assistance in walking beyond mere directional guidance (as we have found), constitutes in the circumstances of this case a failure, pursuant to regulation 34(4) of the Social Security (Adjudication) Regulations 1984, adequately to record the material findings of fact in their reasons for their decision."

The Secretary of State's representative submits that the tribunal

"have considered the help given by the member" in this case. However, it is not enough for a tribunal to "consider" a matter. They are obliged by the legislation to record their findings on it. Regulation 34(4) of the 1984 regulations has now been replaced by regulation 31(4) of the Social Security (Adjudication) Regulations 1986 which provides:

> "A medical appeal tribunal shall in each case record their decision in writing and shall include in such record, which shall be signed by all members of the tribunal, a statement of the reasons for their decision, including their findings on all questions of fact material to the decision."

It seems to me that the proper compliance with what is now regulation 31(4) of the 1986 regulations envisaged by the Tribunal of Commissioners in R(M) 1/89 requires a tribunal to record whether the member was providing real assistance to the claimant and to explain whether they thought that the claimant could walk the same distance or some shorter distance without any assistance beyond mere directional guidance from another person. The onus on the tribunal may be heavy but the fact that a claimant is provided with assistance during a walking test does inevitably raise the question whether that assistance was necessary to enable the claimant to walk without severe discomfort to the extent that she did. In the present case, I take the view that there was a failure to record sufficient findings and that the decision of the tribunal is erroneous in point of law on that ground.

7. In a direction dated 6 January 1993, a Nominated Officer at the Office of the Social Security Commissioners asked for further submissions as to whether the tribunal had adequately dealt with the question of non-renewal of an award in the light of Commissioners' decisions CM/44/91 and CSM/91/90. On behalf of the Secretary of State it is accurately submitted that in CM/44/91, the Commissioner held that, as a general rule, if a sufficient explanation is given by a medical appeal tribunal as to why they arrived at the particular conclusion that they did, there is no obligation to go further and explain why that conclusion differs from that of an earlier adjudicating medical authority. It is accepted on behalf of the Secretary of State that there may be exceptions to that general rule. In CSM/91/90, it was held that there was, in the circumstances of that particular case, an obligation to give reasons for holding that a claimant no longer qualified for mobility allowance when he had previously been awarded mobility allowance for 5 years. However, the Secretary of State's representative distinguishes that case from the present on the ground that the claimant in that case was suffering from a progressive condition where deterioration was to be expected at a greater rate than in the present case.

8. I am not sure that the <u>rate</u> of deterioration really affects the principle. In any event, there is was some question in the present case as to whether or not there had been any deterioration. In both 1985 and 1986, the examining doctors

recorded the claimant herself as having said that there had been some improvement since the previous examinations. The consultant's report dated 9 January 1991 also suggests some improvement followed by some deterioration. The claimant herself told the tribunal that her condition had got worse during the last 2 years. The tribunal recorded no finding on that issue.

9. More fundamental in my view is the question whether CM/44/91 was rightly decided in so far as the Commissioner held that there was no general rule that a tribunal should explain to a claimant why they have come to a different conclusion from that of an adjudicating authority that has previously decided that the medical condition for mobility allowance have been satisfied. This issue raised by the Nominated Officer is one of considerable practical importance. Since the Secretary of State's representative made the submission in this case, the decision in CM/44/91 has been considered by the Court of Appeal in Kitchen and ors. v. Secretary of State for Social Security (The Times September 14, 1993). Four cases were heard together by the court; CM/44/91 was the case of Begum and on behalf of Ms. Begum it was argued that tribunals were obliged to explain, in cases where the applicant had been in receipt of the relevant allowance previously, why the applicant was no longer eligible for the allowance.

10. Before considering the Court of Appeal's decision in Kitchen and ors, it is desirable to look at the differing views of Commissioners on the question of the standard of reasoning to be required of tribunals generally and in particular in cases of renewal claims for disability benefits. In R(A) 2/83, the Commissioner said at paragraph 5:

> "I commented, when granting leave to the claimant to appeal, that her condition would not appear to have changed for the better, since she was awarded a higher rate certificate in May 1977 for 4 years. It is submitted on behalf of the Secretary of State that the DMP was not bound to follow the earlier decision, dated 13 May 1977, which awarded a higher rate certificate. I have not even suggested that the DMP was so bound. Plainly a person's condition might change for better or for worse, and even so, the DMP must consider the matter in the light of the prevailing evidence. Such determinations depend, however, largely upon individual medical opinion, and, in my view, it is desirable that, when there has been a previous certification in respect of a condition relating to attendance allowance, in the absence of material change, careful consideration should be given to whether subsequent evidence warrants a different conclusion. It may be that the previous determination was plainly wrong. If possible, a situation should be avoided in which medical practitioners, who hold different personal opinions on similar medical circumstances, give contrary decisions, which the general public, and particularly those afflicted by disabling conditions and those associated

with them and who care for them, do not understand and is apt to produce a feeling of injustice."

In CM/54/88, a Commissioner held that mobility allowance cases could be distinguished from attendance allowance cases, but in CM/205/88, a Tribunal of Commissioners rejected that view and considered in some depth the standard of reasoning required of tribunals in cases concerning renewal claims for mobility allowance. Having considered R(A) 2/83 and the decision of the Court of Appeal in Baron v. Secretary of State for Social Services (reported as an appendix to R(M) 6/86), the Tribunal concluded at paragraph 13:

"Against that background and having taken into account the Act and Regulations, which make no provision in terms for renewal of a mobility allowance, so that in law a renewal application is simply a fresh application for an allowance, 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 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 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. And that we consider requires to be done with some care in a renewal case where it has a history of differing views for and against satisfaction of the medical conditions for the allowance. The simplest cases may well be where, on the one hand, the tribunal is able to say, for example, that the degree of discomfort caused by walking is no longer severe or that the walking factors, mentioned in regulation 3(1)(b) of the Mobility Allowance Regulations - distance, speed, length of time or manner for, at or in which the claimant can make progress on foot out of doors - have, some or all, so improved as to make the difference. There may be cases where the tribunal takes the view that the earlier awarding medical authority came to a wrong conclusion and in that event they will have so to say, but also indicate briefly in what way. But there are the other less simple cases. In them differing views may have been either because of fluctuations in the claimant's

condition so that a peak or trough has been found at one - or it may be more - of the single examinations and has been, or is thought to have been, given prominence in the forming of a medical opinion on virtual inability to walk, or because on considering properly the relevant facts the decisions have resulted from a fine balancing, a personal medical view of such facts, or a particular technical consideration. In all such cases the question, and it may sometimes be a difficult one, for the medical authority will be whether the fineness of balance, or, as the case may be, the personal or technical view or point justifies an apparently contrary result which to the layman, thus a claimant, may appear contradictory of earlier findings - or even in certain cases an oscillation of contradictions. Thus in the present case, clearly, there has arisen from the apparently oscillating medical views, a sense of injustice. That, as the Commissioner indicated in R(A) 2/83 is to be avoided if possible. It is in the end a question of balancing the practical weight of the opinion, or of the personal or technical point, against the relatively abstract but important requirement that justice be seen to be done so as to avoid so far as may be emerging a history of divisions of opinion amongst the medical authorities, for and against the claimant satisfying the medical conditions on broadly the same factual basis. In regard to both types of difficult case we endorse what was said by the Commissioner in the passage quoted from R(A) 2/83. Clearly in this particular case differing opinions have produced a feeling of injustice. That may sometimes be inevitable but it is desirable for the adjudicating authorities concerned with a scheme such as that of mobility allowance to avoid giving rise to such feelings through apparently contradictory views. If justice is not perceived to being done confidence in the system will tend to erode. Hence we conclude that if a decision different from the preceding one is in mind and there is not involved as the reason therefor one of the clear grounds - material change of circumstances from, or what is being held to have been a medical error in, or a factor novel to the earlier decision - then, as was indicated in R(A) 2/83, careful consideration must be given to the question whether evidence about developments subsequent to the awarding decision really warrants such a different conclusion. That in turn means that an appeal tribunal must do their best so to relate that decision to the preceding medical history, as to spell out why an apparent contradiction is not in truth one so as to let the claimant understand for what reason, or reasons, he or she is to lose an allowance thitherto enjoyed."

In R(A)2/89, another Commissioner applied the approach suggested

in R(A) 2/83. At paragraph 3 of his decision, he said:

> "The Secretary of State submits that the determination was erroneous in law on a somewhat narrow ground, viz. that the determination withholds acceptance that a night condition was satisfied where previously it had been accepted, but does not explain whether this is because in the view of the DMP there has been a change for the better in the claimant's condition or because, in his view, the previous determination was wrong, a conclusion that he might have difficulty in reaching without seeing the evidence on which the previous conclusion was reached. I accept this submission, which is supported by paragraph 5 of Decision R(A)2/83. I acknowledge that in this case the DMP expressly alluded to the fact his conclusion differed from that given in relation to an earlier period, but nevertheless gave his different decision (determination) on the present claim. This is not however in my judgment sufficient. It leaves it uncertain whether (contrary to the express contention of the claimant) the DMP thought that there had been some improvement, or whether he simply disagreed with the previous DMP. If one DMP does disagree with the conclusion of a previous DMP it is desirable that he should put his name to a statement that he does so, and that he should not leave it to implication. This calls his attention to the significance of what he is deciding."

11. In CM/44/91, the Commissioner took the view that the decision of the Tribunal in CM/205/88 was inconsistent with two decisions of the Court of Appeal, Regina v. National Insurance Commissioner, ex parte Viscusi [1974] 1 W.L.R 646 (also reported as an appendix to (R(I) 2/73) and Braithwaite v. Secretary of State for Social Services (3 July 1986, unreported). In CM/44/1991 itself, the claimant, Ms Begum, had been awarded mobility allowance for 10 years from the age of 7 and she applied again at the end of that period. The medical appeal tribunal recorded a detailed description of their observation of the claimant walking but did not deal specifically with the question whether they thought there had been any improvement in her walking ability.

12. In Viscusi, the claimant suffered an industrial accident and two medical appeal tribunals found in respect of two consecutive periods of nine months, the second of which ended on 25 June 1967, that he had suffered disablement as a result of a loss of faculty due to the industrial accident. A third medical appeal tribunal decided as follows.

> "After examination, we accept the report of Mr Noel Thompson and agree with his findings and opinion. Whatever may have been the claimant's condition up to June 25, 1967, the condition of his right lower limb thereafter is not attributable to the relevant accident. The assessment must be discharged."

Mr Thompson had said "there must be a strong suspicion of lymphoedema artefacta" and gave reasons. Lymphoedema artefacta means an artificially induced swelling, the implication being that the claimant was a malingerer. The Commissioner dismissed an appeal against the tribunal's decision and neither the Divisional Court nor the Court of Appeal disturbed the Commissioner's decision. In the Court of Appeal all the members of the Court were agreed that decisions in respect of one period were not binding in respect of another. As to reasons, Buckley LJ said at pages 655H to 656C:

> "One final point with which I should perhaps deal is that it was submitted that there had been a failure to comply with the full requirements of regulation 12 of the [National Insurance (Industrial Injuries) (Determination of Claims and Questions)(No.2) Regulations 1967] which requires a medical appeal tribunal to record its decision in writing and to include therein findings on any questions of fact material to the decision. A complaint was made as to the form in which the third medical appeal tribunal dealt with the matter; because, it was said, they departed from the views expressed by the earlier medical appeal tribunals which accepted that Mr Viscusi's disability was genuinely a result of the accident he had suffered, and yet there are no findings of fact to show what circumstances were relied on for that change of view. But this argument in my judgment really proceeds upon a misconception of the effect of the findings of the earlier tribunals. That is the finality point with which I dealt at the beginning of this Judgment. I think this part of the argument really proceeds upon a misapprehension as to the effect of section 50(1) of the [National Insurance (Industrial Injuries) Act 1965]. It was not incumbent, in my view, upon the third medical appeal tribunal to explain why they were differing from the findings of the earlier tribunals for the reason that those earlier findings were final only in relation to the period with which those bodies were dealing at the time. Upon the construction of the decision of the third medical appeal tribunal, as I say, I understand them to be saying that they have a right to their conclusion either upon the basis that they had grave suspicion as a result of which they were not satisfied that the claimant had made out his case, or that on the balance of probability there was no connection between the disability from which Mr Viscusi was then suffering and the accident of which he was the victim."

13. In Braithwaite, attendance allowance was awarded in respect of a young girl for 4 years from the age of 4 and then for further periods of 3 years and 2 years. However, when she was 13, a renewal claim was rejected. It was a necessary condition of entitlement that she should require "attention [or

supervision] substantially in excess of that normally required by a child of the same age and sex" (regulation 6 of the Social Security (Attendance Allowance) (No.2) Regulations 1975). The delegated medical practitioner deciding that the renewal claim should not succeed said that "generally speaking, the disparity in the amount of attention required by a deaf child and a child of the same age who is able to hear diminishes as they get older". He then, as the Court of Appeal held, related the case of the child concerned to that general proposition. What is of relevance to the present case is the following short passage of the judgment of Balcombe LJ with whom Purchas and Mustill LJJ agreed.

> "[The delegated medical practitioner] is also criticised by [counsel] because he does not specifically indicate what differences he maintains have occurred in Dawn's development since the previous certificate had been granted. But in my judgment there was no legal obligation upon him to do so, and he deals with the case, in the manner which I have stated, perfectly adequately."

14. I take the view that CM/205/88 is distinguishable from both Viscusi and Braithwaite and is not inconsistent with them. Viscusi and Braithwaite are both cases where it was quite clear why the adjudicating authority was differing from earlier decisions. In Viscusi, it was because the tribunal thought that the claimant was malingering. That finding by itself made it clear why a different conclusion had been reached and it was unnecessary for the tribunal to indicate whether they thought that the claimant had been malingering before or not. In Braithwaite it was because the child was getting older and the view of the delegated medical practitioner was that for that reason her need for attention relative to other children of the same age and sex was becoming less. In CM/205/88, the tribunal expressly rejected a submission 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", just as the Commissioner in R(A) 2/83 recognised that an adjudicating authority dealing with one period is not bound to follow an earlier decision. What is required is an adequate statement of the reasons and what is clear from Viscusi and Braithwaite is that a statement of reasons will be adequate without any express reference to an earlier decision provided that it is possible to infer from the statement the reason why the adjudicating authority's decision is different from that earlier decision. Where it is clear that the authority has decided that either there has been a change of circumstances or that the earlier decision was simply wrong, it is not always necessary for the authority to specify which of those alternatives is correct.

15. In Kitchen and ors, the Court of Appeal, was, as I have

said, concerned with four cases. In addition to Ms Begum's case, there was another mobility allowance case which had been decided by the same Commissioner at the same time as Ms Begum's. The claimant in that case was Mrs Moran and she had been awarded mobility allowance for periods of 1 year and 2 years and then had failed on a renewal claim. When first claiming, she had said "I can walk about 200 yards and then I get a pain in the back which makes me breathless". The medical appeal tribunal considering the second renewal claim said:

> "We have read the scheduled evidence and listened to the claimant and [her representative]. We have also examined the claimant and observed her walk in the corridor here. We are told that the claimant is worse than when she was getting the allowance. The pain is all over now and the left side pain stops her walking after a short distance. The local grocer is 4/5 houses - she can manage to get there and back. Her walking distance is governed by pain. She complains of a lump in the left hip region which comes out after standing.
>
> On examination we found movements of the spine to be virtually nil with much voluntary muscle spasm. She could sit upright with her leg extended. There was no neurological change in the lower limbs. She resisted fully extending the left knee. There was however no swelling and flexion was good. She resisted movement of other joints for no obvious physical cause or reason. Her fingers and hands were normal.
>
> When she walked in the corridor here over 25 yards, with a stick in her right hand, she did so slowly with no sign of severe discomfort.
>
> Although we admit the claimant's mobility is impaired we can find insufficient clinical evidence to lead us to the conclusion that she is virtually unable to walk. The appeal is therefore dismissed."

The other two cases before the Court of Appeal were industrial injury cases, neither of which involved a renewal claim.

16. Neill LJ, with whom Nolan and Evans LJJ agreed, set out some broad guidelines for appellate courts which have to consider whether a decision of a tribunal complies with regulation 31(4) of the 1986 Regulations, the fourth of which was in the following terms:

> "A decision on a question of causation may pose particular difficulties when one is examining the adequacy of the reason 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 a 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."

He then turned to the individual cases.

> "I propose to deal first with the cases of Moran and Begum. I have come to the conclusion that in these two cases 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. Thus, for example, the decisions do not deal with the dates to which the findings were related. On the other hand, the decisions include adequate findings of fact to 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'."

17. The Court of Appeal expressed no view on that part of the Commissioner's decision in Begum to the effect that CM/205/88 had been wrongly decided. There is a hint in the first of the two passages set out above that special considerations do apply when a claimant has previously been in receipt of some benefit or allowance. However, that is set entirely in the context of decisions on questions of causation as in Viscusi. Neither Moran nor Begum was a case involving a question of causation. Neither of the other cases before the Court of Appeal involved earlier periods of entitlement to benefit. On the other hand, it is difficult to see why previous entitlement to benefit, if it is important in cases involving questions of causation, should be important only in such cases. I rather think that Neill LJ referred to issues of causation because he had Viscusi in mind, as is suggested by the reference to "malingering or bad faith."

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 disablement over a long period on the basis of one or more 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.

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 tribunals 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. I do not consider that the burden placed on tribunals dealing with continuation claims (and reassessments) is too onerous. Indeed, it is likely to be easier for disability appeal tribunals who now have to deal with these issues in many of the more complex cases than it is for medical appeal tribunals because, after the initial transitional period, appeals to disability appeal tribunals are from an adjudication officer rather than a medical board. A medical board are not required to give a reason for their decision and are not a party to the proceedings before a medical appeal tribunal. However a disability appeal tribunal may expect a reasoned submission from an adjudication officer who ought to have considered these issues. That submission should

assist the disability appeal tribunal in formulating their reasons. Medical appeal tribunals are, and disability appeal tribunals should also be, given information in respect of past claims because it may be relevant and so the tribunal should have considered that evidence. It is not asking a great deal if the tribunal is to record briefly their view of the relevance of the information given to, and considered by, them. If there has been a material change in the claimant's condition it is easy to say so. In some other cases a tribunal will be able to do little more than say that "we accept that there has been no improvement in the claimant's condition but, on the findings we have recorded, we do not consider that it is possible to say she is virtually unable to walk notwithstanding the decision of the last adjudicating authority". At least the claimant can then see that the tribunal have addressed their minds to the discrepancy between their decision and the earlier decision and will be able to follow the reasoning provided that the findings are sufficiently detailed.

23. I differ slightly from the view expressed by the Commissioner in R(A)2/89 (see paragraph 10 above). I accept that there are cases where a tribunal is unable to decide whether there has been an improvement in a claimant's ability to walk or the previous decision was just wrong. Viscusi is authority for the proposition that it is unnecessary in such cases for the tribunal to decide that issue. However, in my view a tribunal is obliged in such a case to state clearly that in their view either there has been improvement or the previous decision must have been perverse, if they propose to decide that a claimant does not satisfy the conditions for a benefit that was previously in payment. Otherwise they have not shown that they have considered all the relevant issues. As a matter of strict logic, it would doubtless be sufficient to state only that it would be perverse to decide that the claimant satisfied the medical conditions in respect of the relevant current period, because the possibility of improvement would be implied. However, in practice, it will usually be relevant to ask the claimant whether he or she thinks there has been any change in his or her condition since the last decision was made and, in my view, a claimant is entitled to know from their record of decision that the tribunal has considered that issue even if the tribunal has felt unable to reach a decision on it. It is particularly important that a decision is related to previous decisions in a case where the claimant is suffering from a condition from which deterioration in his or her walking ability is usually to be expected (as in CSM/91/90) or even one from which improvement is not usually to be expected.

24. It is not necessary for me to decide whether a similar approach to individual consistency is required where a claimant has been turned down and the claimant then makes a fresh application. It might be argued that perceptions of injustice would be different in that situation. On the other hand, I suspect that most unsuccessful claimants do not reapply unless they feel there has been some deterioration in their condition or they feel that they did not properly describe the extent of

their disablement on their first application, and so I do not think that there would be great practical disadvantages to claimants if the view were taken that consistency is just as desirable where decisions are made against claimants rather than in their favour.

25. Returning to the facts of the present case, this seems to me to be one where it was necessary for the tribunal to decide whether or not they thought there had been any improvement since the previous award of benefit (as to which there was conflicting evidence) and to consider carefully whether the evidence as a whole suggested that the claimant's ability to walk on the day of the hearing was representative of her ability during the whole period since the expiry of the previous award. If they thought that there had been no improvement, they should have considered whether it was possible on their findings, in respect of the period at issue, to decide that the claimant was virtually unable to walk bearing in mind the desirability of consistency. On the other hand if they thought there had been an improvement, it was necessary merely for them to say so and then to consider the medical questions in the usual way. The reasons given by the medical appeal tribunal in this case do not show that they addressed their minds to all those issues and I therefore hold the tribunal to have erred in point of law on that ground as well as the ground mentioned in paragraph 6 above.

26. My decision is set out in paragraph 1 above.

(Signed) M. Rowland
Commissioner

(Date) 29th October 1993