

**SOCIAL SECURITY ACTS 1975 TO 1984****APPEAL FROM DECISION OF MEDICAL APPEAL TRIBUNAL ON A QUESTION OF LAW  
DECISION BY TRIBUNAL OF COMMISSIONERS**

**Name:** P Desai on behalf of Kanta Desai (deceased)

**Medical Appeal Tribunal:** London North

**Original Decision Case No:** 84/107/06

**[ORAL HEARING]**

1. Our decision is that the decision of the medical appeal tribunal dated 17 May 1984 is erroneous in law and is set aside.
2. This is an appeal by the claimant's appointee, with leave, on a question of law against the decision of a medical appeal tribunal dated 17 May 1984 whereby the tribunal held that the claimant did not satisfy the medical conditions for an award of mobility allowance under the provisions of section 37A of the Social Security Act 1975. The main question raised is whether mobility allowance can be awarded from a date later than the date of receipt of the claim to a claimant who fails to satisfy the medical conditions for the allowance at the date of claim. The appeal was dealt with along with an adjudication officer's appeal raising related issues (CM/118/1985), by a Tribunal of Commissioners at an oral hearing at which the claimant was represented by Mr. R. Drabble instructed by Mr. R. Smith of the Child Poverty Action Group, and the Secretary of State was represented by Mr. P. Milledge of the solicitor's office of the Department of Health and Social Security. We are indebted to both counsel for their assistance.
3. The circumstances of this case are, in brief, that a claim for mobility allowance under section 37A of the Social Security Act 1975 was made on behalf of the claimant on a claim form received by the Secretary of State on 15 September 1982. The claimant was then aged 58 and was blind and suffered from certain other medical conditions. She died on 17 December 1983, whilst the claim was under appeal. Her appeal has been continued by her husband as her appointee.
4. Section 37A of the Social Security Act 1975, inserted by section 22(1) of the Social Security Pensions Act 1975, contains the following provisions:-
  - "37A.- (1) Subject to the provisions of this section, a person who satisfies prescribed conditions as to residence or presence in Great Britain shall be entitled to a mobility allowance for any period throughout which he is suffering from physical disablement such that he is either unable to walk or virtually unable to do so.
  - (2) Regulations may prescribe the circumstances in which a person is or is not to be treated for the purposes of this section as suffering from such physical disablement as is mentioned above; but a person qualifies for the allowance only if -
    - (a) his inability or virtual inability to walk is likely to persist for at least 12

months from the time when a claim for the allowance is received by the Secretary of State: and

- (b) during most of that period his condition will be such as permits him from time to time to benefit from enhanced facilities for locomotion.
- (3) to (6) .....
- (7) Except so far as may be provided by regulations, the question of a person's entitlement to a mobility allowance shall be determined as at the date when a claim for the allowance is received by the secretary of State."

5. The Mobility Allowance Regulations 1975 (SI 1975 No. 1573), as amended, ("the Mobility Allowance Regulations") contain, in regulation 3, provisions describing the circumstances in which a person is to be treated for the purposes of section 37A as unable to walk or virtually unable to do so. They also contain, in Part IV, regulations relating to the determination of claims and questions in mobility allowance cases including the formulation of the medical questions arising in connection with a claim. The provisions of Part IV of the Mobility Allowance Regulations have been substantially reproduced in Part X of the Social Security (Adjudication) Regulations 1984 (SI 1984 No. 451) ("the Adjudication Regulations") which came into force on 23 April 1984 and it is convenient to refer to the latter regulations where no change is involved. Under regulation 53(1) of the Adjudication Regulations (Regulation 13(1) of the Mobility Allowance Regulations) it is provided:-

"53.-(1) In this Part any question arising in connection with a claim for or award of mobility allowance:-

- (a) whether a person is suffering from physical disablement such that he is either unable to walk or virtually unable to do so; or
- (b) whether such inability or virtual inability to walk is likely to persist for at least 12 months from a specified date; or
- (c) for what period, being a period limited by reference either to a person's attaining the age of 75 or to a definite earlier date, the person may be expected to continue to be unable, or virtually unable to walk; or
- (d) whether during most of the period during which a person may be expected to continue to be unable, or virtually unable to walk, his condition will be such as permits him from time to time to benefit from enhanced facilities for locomotion,

is referred to as a medical question."

6. In the present case the medical appeal tribunal held, confirming the decision of a medical board, that the claimant was unable to satisfy the medical conditions for mobility allowance in respect of the first question formulated in regulation 53(1)(a) quoted above, as at the date when her claim was received. In addition, in response to an invitation by the Secretary of State to consider the possibility, the medical appeal tribunal held that there was a period subsequent to the date of the receipt of claim and after the date of the medical board's assessment (on 8 March 1983) during which the claimant was unable to walk. The tribunal held however that the claimant did not even then satisfy the medical conditions for mobility allowance, because the period of her inability to walk did not last for 12 months or more. It was not suggested on behalf of the claimant that the decision of the tribunal on the claimant's inability to satisfy the medical conditions as at the date of the receipt of her claim was erroneous in law. The purpose of the appeal was to seek to establish 1) that under

the relevant legislation it was competent for the medical appeal tribunal to find that the medical conditions were satisfied at a date later than the date of claim, but (2) that having done so, the tribunal in the present case had erred in rejecting the claimant's appeal on the basis that her inability to walk had not lasted 12 months, the proper statutory test in this respect under section 37A(2) and regulation 53(1)(b) being one of likelihood at the relevant date. The validity of the latter point taken on behalf of the claimant was immediately conceded by Mr. Milledge on behalf of the Secretary of State.

7. It was common ground between the parties' representatives that no regulations had been made specifically with reference to section 37A(7) modifying the provision contained therein that the question of entitlement to mobility allowance is to be determined as at the date when the claim is received by the Secretary of State. The Secretary of State has, however for long been accustomed in appropriate cases to invite medical appeal tribunals to consider the possibility of a claimant satisfying the medical conditions from a date later than the date of the receipt of claim if he is held unable to do so at the earlier date. The form MY 365 hitherto in use for completion by medical appeal tribunals in such cases specifically provides for the tribunal to deal with this possibility. The competency of such a course has recently been questioned by some Commissioners in unreported decisions. In unreported decision CM/83/84 the Commissioner was firmly of the view that entitlement was tied to the date of receipt of claim under section 37A(7). Since the claimant was found to be virtually unable to walk at that date, however, it was not a case directly raising the question of the competency of an award from a later date. In unreported decision CM/105/1984 the Commissioner held that a medical appeal tribunal were not required to make findings regarding the deterioration in a claimant's condition subsequent to the date of claim, because of the limitation imposed by section 37A(7). In unreported decision CM/137/1982 a Commissioner held that the condition of the claimant at the date of the receipt of claim was critical and a subsequent deterioration would not enable an award to be made. He expressed the opinion that, conversely, an award to a claimant who satisfied the conditions at the date of claim would not be affected by a subsequent improvement in physical conditions, because he regarded it as doubtful if the decision awarding mobility allowance could be reviewed and revised.

8. In the case of Insurance Officer v. Hemmant [1984] 1 WLR 857 (reported as the Appendix to Decision R(M) 2/84) the Court of Appeal upheld the right of an adjudication officer to review an award of mobility allowance where at a date subsequent to the date of claim the claimant, by leaving Great Britain and going to settle in the Irish Republic, ceased to satisfy one of the non-medical conditions of entitlement to mobility allowance, namely the residence condition. In so doing the Court of Appeal rejected the conclusion of the Commissioner based on section 37A(7) that all questions of entitlement fell to be determined once and for all at the date of claim. Following the decision in Hemmant the Commissioner who decided CM/137/1982 reconsidered the position in unreported decision CM/74/84. He pointed out that the first medical question contained in regulation 53(1)(a) was not circumscribed by reference to the date of claim and expressed the view that the effect of section 37A(7) is obscure. He considered it possible that in light of Hemmant a commonsense view of section 37A(7) might be taken and a claim for mobility allowance be regarded as a continuing claim until finally disposed of in the same way as certain other non-contributory benefits so as to permit an award to be made in pursuance of it from a date later than the date of receipt of claim.

9. On behalf of the claimant Mr. Drabble approached the question whether the statutory provisions permit mobility allowance to be awarded from a later date without the necessity of a further claim by referring to the different functions of the insurance (now adjudication) officer who decides non-medical questions and issues the decisions awarding or disallowing the benefit on the one hand and those of the medical appeal tribunal who are authorised to determine the medical questions in an appeal from a medical board on the other hand. He argued that the medical questions as set out in regulation 53(1) of the Adjudication Regulations which are referred to a medical appeal tribunal entitled the tribunal to find that

a claimant who failed to satisfy those conditions as at the date of receipt of the claim nevertheless did satisfy them from some later date and that the insurance (now adjudication) officer was entitled to give effect to such a decision without requiring a further claim to be lodged. He suggested that little weight should be attached to the final words of section 37A(7) which refer to the date when a claim for the allowance "is received by the Secretary of State". The claim should be regarded as a continuing claim until finally disposed of. He referred to Decision R(S) 1/83, paragraph 9. The effect of the specific provision of section 37A(7) should be confined to excluding entitlement before the date when the claim was received and excluding prospective claims, which he defined as claims seeking adjudication in advance for a future period. Mr. Drabble urged upon us the consideration that the requirement of a further claim was an apparently empty requirement which could have been satisfied in the present case by merely sending a photostat copy of the original claim. Alternatively, Mr. Drabble contended that the wording of the medical questions in regulation 53(1) represented an "implied exercise" of the excepting provisions in section 37A(7). He conceded that the terms of section 37A(2)(a) rendering it essential that the inability or virtual inability to walk be likely to persist for at least 12 months from the time when the claim is received represented an obstacle to this argument. Dealing with the position of an insurance or adjudication officer who had issued an adverse decision based on the decision of a medical board that the medical conditions were not satisfied he submitted that the adverse decision fell to be reviewed and revised under section 104 of the Social Security Act 1975 following the reversal or variation of the medical board's decision by a medical appeal tribunal even if it was restricted in effect to a later date than the date of claim. The case of Insurance Officer v. Hemmant was an authority for the proposition that at least for the purposes of review entitlement was not tied to the circumstances obtaining at the date of the claim notwithstanding section 37A(7). We deal with the position of the insurance (now adjudication) officer in our decision in the related appeal CM/118/1985, a copy of which accompanies this decision.

10. On behalf of the Secretary of State Mr. Milledge argued that the first medical question for consideration by a medical appeal tribunal under regulation 53(1)(a) of the Adjudication Regulations was whether or not the claimant was unable or virtually unable to walk at the date on which the claim was received by the Secretary of State. Whether or not the question was referred to the tribunal in those specific terms the tribunal must have regard to section 37A(7) and answer that question as at that date. Section 37A(7) rendered the date of receipt of the claim a landmark in the adjudication of claims for mobility allowance and this was confirmed, he said, by section 37A(2)(a). He contended that neither the wording of the medical questions in regulation 53(1)(a) of the Adjudication Regulations nor the power conferred upon medical appeal tribunals under regulation 58(3) to determine "any other medical question which arises" represented an exercise of the power to provide by regulation otherwise than as laid down in section 37A(7). The only exercise of that power was to be found in the wording of regulation 20(3) of the Mobility Allowance Regulations 1975 which provides that on review a medical board may deal with a case in any manner in which they would deal with it on an original reference: "except that on such review any medical question arising in connection with a person's entitlement to an allowance shall be determined as at the date when the application for review is made". The words quoted had been omitted from the corresponding regulation (regulation 60(3) of the Adjudication Regulations) in 1984 but restored by amendment with effect from 28 January 1985. See the Social Security (Adjudication) (Amendment)(No.2) Regulations 1984 (SI 1984 No. 1991) Regulation 2(g).

11. In Insurance Officer v. Hemmant it was observed by Oliver L. J. under reference to section 37A(7): "But the question of his entitlement, certainly as regards his original claim for allowance, has to be judged at the date when the claim is received by the Secretary of State." The critical question is whether the statutory provisions also preclude an award of mobility allowance based on a finding that the medical conditions, although not satisfied as at the date of receipt of claim, are satisfied at some later date whilst the claim is under appeal. In the obverse situation of an initial award from the date of claim followed by a

change of circumstances during the currency of an award the decision of the Court of Appeal in Hemmant is authority for the proposition that entitlement depends upon continuing satisfaction of the conditions of the award and that an award is subject to review, notwithstanding section 37A(7), if a claimant ceases to satisfy the essential conditions. To that extent therefore and in the context of review, section 37A(7) is not to be construed so widely as to offend commonsense.

12. There is another problem in relation to subsections (2) and (7) of section 37A in that these subsections must, if possible, be so construed as to admit of the possibility of regulations being expressly made under section 37A(7) which would not be rendered ineffectual by the provisions of subsection (2) and in particular the provision that "a person qualifies for the allowance only if -

- (a) his inability or virtual inability to walk is likely to persist for at least 12 months from the time when the claim for the allowance is received by the Secretary of State;"

That provision is not subject to any regulation-making exception and in order to reconcile subsections (2) and (7) it would appear necessary to construe the words "from the time" in the above-quoted provisions of subsection (2) as meaning "after the date". This would reflect what appears to be the purpose of the provision, namely, that it is a condition of mobility allowance that the claimant's condition is likely to persist for at least a 12 month period after the date from which entitlement is established. Such a reading does no violence to the language of subsection (2) and is, for what it is worth, consistent with the wording of the corresponding medical question contained in regulation 53(1)(b) which refers to the qualifying condition being likely to persist for "at least 12 months from a specified date." It is also consistent with the regulation making power under section 22(3) of the Social Security Pensions Act 1975 exercised in regulation 5 of the Mobility Allowance Regulations under which a claim may in certain circumstances specifically be made for an award to commence at a date after the date of claim. It would furthermore be consistent with the provision of regulation 29(3) of the Mobility Allowance Regulations referred to by Mr. Milledge as noted above whereby, on review, a medical board is to determine any medical question arising in connection with a person's entitlement to an allowance as at the date when the application for review is made. If for these reasons the provisions of subsection (2) of section 37A fall to be construed in the way suggested above it is apparent that that subsection does not reinforce an argument based on subsection (7) that the only relevant date for considering the question of a person's entitlement to mobility allowance is the date of receipt of claim.

13. No compelling reason has been advanced to us for treating the provisions of section 37A as excluding the possibility, on a claim not yet finally disposed of, of finding the medical conditions satisfied from a date later than the date of claim. Indeed the Secretary of State's representative could hardly be expected to suggest any such reason in view of the long standing practice of inviting medical appeal tribunals to make such determinations in appropriate cases. If a claim were to be treated as continuing daily until disposed of it would seem inexorably to follow that an award upon it from a date later than the date of its initial receipt would be dependent upon a claimant satisfying, at such later date, all the conditions for entitlement to the allowance. We see no inherent difficulty in this consequence. If so, the requirement of submitting a fresh claim or claims during the period when the first claim is under adjudication appears to serve no intelligible purpose. A further claim would not be required in the analogous case of a continuing claim for non-contributory invalidity pension under the same Chapter of the Social Security Act 1975, see Decision R(S) 1/83, and the Court of Appeal in Hemmant declined to attach much importance to differences in the wording of section 37A, which was inserted by subsequent legislation, when considering the question of continuing need to satisfy the qualifying conditions of subsection (1). Referring to subsection (7) Oliver L.J. observed: "Equally, the obvious purpose of subsection (7) is, as it seems to me, simply to indicate the date from which an

entitlement to allowance is to commence." In the circumstances we consider that the provisions of subsection (7) of section 37A should be construed as a "landmark", as suggested by Mr. Milledge, rendering the date of receipt of claim the appropriate date at which the question of a claimant's entitlement to the allowance is first to be examined and determined; but not as precluding the possibility of an award from a later date from which all conditions of the allowance are satisfied being made upon a claim which is still under appeal.

14. We conclude that it is competent for a medical appeal tribunal to consider in an appropriate case whether a claimant who is unable to satisfy the medical conditions for an award as at the date of claim is able to do so as at and from some subsequent date. If that is to be regarded as dealing with an additional medical question the medical appeal tribunals have specific power to deal with such an additional question under regulation 58(3) of the Adjudication Regulations (formerly regulation 18(3) of the Mobility Allowance Regulations). It follows that the tribunal did not err in law in considering and deciding upon that issue in the present case. We agree however with the concession made by Mr. Milledge on behalf of the Secretary of State that the medical appeal tribunal clearly erred in attempting to answer the second medical question contained in regulation 53(1)(b) of the Adjudication Regulations (formerly regulation 13(1)(b) of the Mobility Allowance Regulations) in that they determined that the claimant's inability to walk had not persisted for at least 12 months instead of considering whether as at the relevant date it was "likely to persist for at least 12 months". That was a question to be answered on the basis of the medical probabilities at the relevant date.

15. In the result our conclusion in the present case is that the decision of the medical appeal tribunal, while not erroneous in law in considering and deciding the question of the claimant's ability to satisfy the medical conditions at a date subsequent to the date of claim, was erroneous in law in so far as the tribunal misapplied the statutory provisions of section 37A(2)(a) and the medical question now appearing in regulation 53(1)(b) of the Adjudication Regulations. The decision of the tribunal must accordingly be set aside as erroneous in law. The claimant's case will fall to be referred for reconsideration by another medical appeal tribunal which should in accordance with normal practice be differently constituted.

16. The appeal of the claimant is allowed.

**(Signed)** J.S. Watson  
**Commissioner**

**(Signed)** J.G. Mitchell  
**Commissioner**

**(Signed)** J.B. Morcom  
**Commissioner**

**Date:** 12 September 1985