MAT must deal with specific contention, which is supported by a medical report, so claimant can see why they have rejected it.

VGHH/1/LM **Commissioner's File:** CM/144/90

**SOCIAL SECURITY ACTS 1975 TO 1990**

**CLAIM FOR MOBILITY ALLOWANCE**

**DECISION OF THE SOCIAL SECURITY COMMISSIONER**

**Name:** Andrew Featherstone

**Appeal Tribunal:** Leeds

**Case No:** 11/4/90

**[ORAL HEARING]**

Decision

1. This claimant's appeal succeeds. My decision is that the decision of the medical appeal tribunal (MAT) dated 9 January 1990 is erroneous in law. I set it aside and refer the case to another MAT for determination in accordance with my directions.

Representation

2. I held oral hearings of this appeal and of two other appeals (Begum and Moran, the references to which on Commissioner's file are respectively CM/044/91 and CM/240/90) which raise similar questions. Copies of my decisions in CM/044/91 and CM/240/1990 are being issued with this decision. In the present case, the claimant (who did not appear) was represented by Mr P. Francis, welfare rights officer, Social Services Department, Barnsley Metropolitan Borough Council. The Secretary of State was represented by Mr M. Jenking-Rees of the Solicitor's Office, Departments of Health and Social Security.

Nature of the appeal

3. The issue before the MAT was whether the claimant was unable or virtually unable to walk in terms of the Mobility Allowance Regulations. The question arising is whether the MAT have given sufficient reasons for their decision that the claimant was neither unable, nor virtually unable, to walk.

The relevant statutory provisions

4. These are set out in the two decisions referred to in paragraph 2 above, copies of which accompany this decision.

The claim for mobility allowance

5. The claim for mobility allowance to which this appeal relates was received on 12 October 1988. It was a renewal claim. The claimant, who was born on 10 January 1967, had been awarded mobility allowance from 24 February 1988 to 23 February 1989.

The medical practitioner's report

6. On 1 February 1989, Dr Macdonald examined the claimant. His condition after tests and his balance were described as satisfactory. His gait was described as good pace, normal limp, leans lightly upon walking stick. He was observed to walk a total of about 100 yards both in and out of doors. He negotiated a ramp and a flight of 6 steps in normal fashion at a good pace. No complaint no evidence of distress. He conversed freely throughout. In his opinion the claimant's physical condition was such that he was not unable to walk and not virtually unable to walk.

7. The claimant appealed against this decision saying he was not better than when he applied for mobility allowance.

The medical board's decision

8. On 13 July 1989 the claimant was examined by a medical board. They recorded that his patella was absent from his right knee which was swollen and stiff. There was $1^1/_2$ inch shortening of the limb. He ascended and descended 9 steps. He walked with a stiff right leg using one stick. He managed to walk in excess of 100 yards from the bus stop to the boarding centre. His physical condition as a whole was such that he was neither unable or virtually unable to walk.

9. The claimant appealed against that decision saying he still had a lot of difficulty in walking and suffered a lot of pain at 30 yards.

The MAT's decision

10. The MAT had before them a report dated 27 October 1989 from Nr N.N. Ghali, F.R.C.S. This set out the history of the claimant's accident, which occurred when riding his motor bike on 1 October 1987, and of his injuries, his stay in hospital and the repeated surgical procedures carried out in 1987. Following his discharge, the report records that he was periodically reviewed in the Orthopaedic Out-patient Department. The report then sets out the history of the claimant's present condition and Mr Ghali's clinical findings made as a result of his clinical examination on 27 October 1989. His report concludes:

> "The natural history of the injuries sustained is such that no further improvement is to be expected and his symptoms and disability will get progressively worse with time. Analysing his clinical review records at Pinderfields Hospital, it is obvious that his condition has already deteriorated over the past twelve months.

In my opinion Mr Featherstone is entitled for mobility allowance. It is rather illogical to have granted Mr Featherstone mobility allowance until March 1989 and it was decided to discontinue the benefit when his condition is obviously gradually deteriorating and will progressively do so in the future."

11. Before the MAT, the Secretary of State made an open submission as to whether the claimant was virtually unable to walk. Mr Francis, who represented the claimant, relied, according to the chairman's note, mainly in Mr Ghali's report.

12. The MAT's decision was:

"1. (a) The decision of the medical board is confirmed.

2. The claimant's physical condition as a whole is such that -

(a) he is NOT unable to walk

(b) he is NOT virtually unable to walk

(c) the exertion required to walk -

(i) would NOT constitute a danger to his life

(ii) would NOT be likely to lead to a serious deterioration in his health."

13. Their recorded reasons for this decision were:@

"We have considered all the scheduled evidence, that listed on the Form MY356A dated 23 November 1989 and that given verbally today. We accept the clinical findings of the Medical Board dated 13 July 1989 and of Mr N N Ghali dated 27 October 1989.

We have seen Mr Featherstone walking indoors and out, a total of some 70 yards, of which 50 yards was out of doors. He carried a stick in his left hand, and walked at a slow to moderate pace, taking 3 minutes for the outdoors part of the test. He stopped several times, complaining of pains in his right loin and back. We do not consider that he qualifies for any of the criteria for a mobility allowance. There was no evidence of severe discomfort or severe distress. We note the previous award, but this was soon after his motorcycle accident, from the results of this he has improved."

The arguments on appeal

14. The claimant appealed against this decision and the Secretary of State originally supported the appeal, relying heavily on decisions CSM/113/1988 and CM/244/1987. I directed an oral hearing of the appeal, together with the appeal referred

to in paragraph 2 above and a fourth appeal, which has not yet been heard. My direction, so far as relevant was:

> "Decision CSM/113/88 is relied upon in the second two appeals. Is that decision good law in the light of the decision of the Court of Appeal in Baron v Secretary of State reported in the Appendix to decision R(M) 6/876 and of the fact that the reasoning in CSM/113/88, as amplified by the Commissioner who gave the decision in Purcell CM/467/89, is inconsistent with Hubble's case [1958] 2 Q.B. 408; Carrarini's case R(I) 13/65 Appendix; and a long train of reported decisions of the Commissioner?"

15. Mr Jenking-Rees, on behalf of the Secretary of State, did not support the original submission of the Secretary of State and submitted that the decision of the MAT was not erroneous in law. As regards the rejection of any reliance on decisions CSM/113/1988 and CM/244/1987, I agree. The reasoning on which those decisions are based is set out in Purcell CM/257/89, which is, as pointed out in the decision in Arrandale, reference CI/370/89, inconsistent with two decisions of the Divisional Court, two of the Court of Appeal and a long train of Commissioner's decisions. I cannot rely on either of the above mentioned decisions in any way.

Was the decision of the MAT erroneous in law?

16. However, in my judgment the appeal must succeed for the following reasons. The claimant's case was that his condition was considerably worse than when he had previously had the allowance. Reliance was placed on Mr Ghali's report. That report states that on analysing the claimant's clinical review records at Pinderfields Hospital, it was obvious that his condition had already deteriorated over the past twelve months. The MAT accepted Mr Ghali's report but stated, in explaining why the claimant was not now entitled to an award, that his condition had improved. Here was a specific contention that required to be dealt with, namely that the claimant's condition had deteriorated since he was previously in receipt of the award. That contention was not a bald unsupported assertion. It was based on a very detailed report by Mr Ghali who founded himself on a study of the clinical records of the hospital. When a specific reasoned contention of this kind is made by a consultant and the MAT accepts all the clinical findings of the consultant but reaches a diametrically opposite conclusion, it is incumbent on the MAT to explain why. The present case differs from the case of Baron v Secretary of State for Social Services, reported in the Appendix to R(M) 6/86 (and very properly referred to by Mr Jenking-Rees) where the MAT had made it quite clear to the claimant the grounds on which they came to their conclusions: see page 366, letters A and B of the report. Here, the MAT, who made no medical examination of their own, have left the claimant guessing as to why they concluded that the claimant had got better, when they were accepting the clinical findings of a consultant who gave a reasoned report as to why he considered the claimant had got worse.

17. I set aside the decision of the MAT as erroneous in law for this reason and refer the case to another MAT which should be entirely differently constituted. That MAT should have before them the clinical review records at Pinderfields Hospital or copies, in the form in which they were before Mr Ghali. If they affirm the medical board conclusion that the claimant is not unable or virtually unable to walk, founding themselves on the clinical findings for Mr Ghali and the hospital, they should explain why they have reached this different conclusion, so that the claimant is not left guessing as to why the case has gone against him on the points which form the basis of his case.

18. My decision is set out in paragraph 1.

**(Signed)** V G H Hallett
**Commissioner**

**Date:** 23 September 1991

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FILE NOs:
CM/44/91 (BEGUM)
CM/240/90 (MORAN)
CM/144/90 (FEATHERSTONE)
CM/309/90 (STUART)

DIRECTION

1. I grant an adjournment of the hearing fixed in Begum for 14 August 1991. It should be re-listed for later August or the first week of September.

2. I direct oral hearings of Moran, Featherstone and Stuart for the same day as Begum. An extra day should be allowed for completion of the hearings. They raise associated questions as to the standard of reasoning required by MAT's.

3. Decision CM/205/88 is relied on by the Secretary of State in the first two appeals. A copy of my Direction in Begum should be sent to the parties in Moran. Is CM/205/88 good law in the light of the two Court of Appeal decisions referred to in that Direction.

4. Decision CSM/113/88 is relied upon in the second two appeals. Is that decision good law in the light of the decision of the Court of Appeal in Baron v Secretary of State reported in the Appendix to decision R(M) 6/86 and of the fact that the reasoning in CSM/113/88, as amplified by the Commissioner who gave the decision in Purcell CM/467/89, is inconsistent with Hubble's case [1958] 2 Q.B. 408; Carrarini's case R(I) 13/65 Appendix; and a long train of reported decisions of the Commissioner?

V G H HALLETT
COMMISSIONER

31 July 1991

LORD CHANCELLOR'S DEPARTMENT

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4-10-91

*Please address any reply to*
THE SECRETARY
*and quote:*
*Your reference:* CM/1XX/90

Mr. T. Francis
Social Services Dept
Regent House, Regent St,
BARNSLEY.



Dear Mr. Francis

RE: Mr. A. Featherstone

I enclose a copy of the Commissioner's decision. A copy has been sent to all the parties involved.

The Commissioner in his decision has referred the case back to a local tribunal. The arrangements for the new tribunal hearing will be made by the tribunal clerk concerned, who will be in touch with you in due course.

However, if you consider that the Commissioner's decision is wrong in any respect there is provision for an appeal against it to the Court of Appeal on a question of law only. If you wish to appeal, you must first have leave (permission) of the Commissioner, and if this is refused, you can ask for leave from the Court of Appeal. Any application for leave to appeal against the decision should be made to this Office within three months from the date of this letter. The Commissioner may extend this time if there are special reasons. The applications should be in writing, and should contain a statement of the question of law in respect of which you think the decision is wrong.

Yours sincerely,

For The Secretary

Enc.

OSSC 42(AR)