

MASTER



MJG/SH/2

Commissioner's File: CM/152/1989

SOCIAL SECURITY ACTS 1975 TO 1986

CLAIM FOR MOBILITY ALLOWANCE

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Name: Peter Eggins

Appeal Tribunal: Plymouth

Case No: P5703 & 04/88

1. I allow the claimant's appeal against the decision of the medical appeal tribunal dated 2 December 1988 as that decision is erroneous in law. The claimant's appeal must be reheard and redetermined by another medical appeal tribunal: Social Security Act 1975, section 112.

2. This is an appeal to the Commissioner by the claimant, a man born on 14 February 1937, against the decision of a medical appeal tribunal dated 2 December 1988, which held that the claimant did not satisfy the medical conditions for an award of mobility allowance (see section 37A of the Social Security Act 1975 and regulation 3 of the Mobility Allowance Regulations 1975). That medical appeal tribunal was in fact rehearing the case by a direction of another Commissioner, in a decision on this file, dated 12 July 1988.

3. The claimant's present appeal to the Commissioner is not supported by the Secretary of State's representative who, in written submissions dated 31 May 1989, gives detailed reasons for not agreeing with the claimant's application for leave to appeal dated 2 December 1988. I have taken into account those grounds of application, the Secretary of State's written submission dated 31 May 1989, and the applicant's written response to the Secretary of State's submission dated 12 July 1989, together with all other relevant documents.

4. First, I should say that I agree with paragraph 10 of the submission of 31 May 1989 of the Secretary of State's representative that, "the differently constituted MAT clearly took considerable care with this case, with the MAT chairman recording comprehensive notes of evidence." That in my view is undoubtedly so and it is only after considerable thought that I have decided that I must declare the medical appeal tribunal's

decision to be erroneous in law, in one respect only.

5. That relates to the question of the claimant's taking of pain killers (analgesics) as to which, in application for leave to appeal dated 31 January 1989, the claimant's representative submits (paragraph 9),

"The claimant provided a list of the medication which he received daily and which enables him to control the pain which he experiences all the time. Despite this medication he says he is in considerable pain, that the Medical Appeal Tribunal has failed to indicate whether they have considered his ability to walk with or without the analgesics although they accept that he takes them. It is further submitted therefore that in this their decision was erroneous in law."

6. In response to that the Secretary of State in his written submission of 31 May 1989 submits (paragraph 9),

"It is submitted in response to the further grounds of appeal that it is clearly to be inferred from regulation 41(1)(b) of the Social Security (Claims and Payments) Regulations 1987 (which replaced regulation 7(1)(b) of the Mobility Allowance Regulations 1975) that the MAT were empowered to take account of medical treatment available to the claimant and which would be expected to improve his condition so as to enable him to walk. The MAT recorded that they accepted 'that the claimant has back trouble for which he takes analgesics ...' and it is submitted that the MAT did not err in law by taking them into account in assessing the claimant's outdoor walking ability."

7. As to this, in the written response dated 12 July 1989 the claimant's representative submits as follows (paragraphs 2-8),

"..the [medical appeal tribunal] noted that the claimant had back trouble for which he took analgesics, and the type and frequency of this medication is noted in the appeal papers, but then failed to indicate whether they considered his ability to walk in the light of this medication or not. The Secretary of State's representative has submitted in paragraph 9 of his submission that the MAT did not err in law because they were empowered to take account of this medication by reason of regulation 41(1)(b) of the Social Security (Claims and Payments) Regulations 1987. Regulation 41(1)(b) is subject to the introductory paragraph of regulation 41(1) which specifies that the Secretary of State shall give the claimant notice requiring him to comply with one of the subsequent directions contained within subparagraphs (a) or (b). Such required notice has never been given. This regulation is intended to apply to a claimant who could improve his or her walking ability by receiving such forms of treatment as physiotherapy or minor surgery, but clearly not simply

not taking tablets to reduce pain. In any event the tablets are prescribed by the claimant's general practitioner and the treatment he prescribes cannot be interfered with by the Secretary of State for Social Services. If the Commissioner accepts that this regulation is not applicable then the decision of the MAT is erroneous in law if they assumed that it allowed them to take into account the applicant's medication when assessing the level of pain which experienced. Similarly they could not apply regulation 3(2) of the Mobility Allowance Regulations 1975 because this clearly relates only to artificial aids and prostheses which the claimant wears or uses and does not apply to medication. It is further submitted that the issue in question in this case and in the previous appeal to the Commissioner has always been whether a claimant who experiences considerable pain all of the time, but has that pain lessened by the use of drugs so that he is able to walk by himself albeit though he is still in pain - should be considered 'virtually unable to walk'. The MAT should therefore have given clear reasoning in their findings on this point and not simply relied on their statement that they 'considered all the relevant documents' and accepted that 'the claimant has back trouble for which he takes analgesics'."

8. The medical appeal tribunal in dealing with this particular matter stated in their decision,

"We accept that the claimant has back trouble for which he takes analgesics and he walks with a stick. We consider that having examined the claimant and seen him walking today, he can walk at least 100 yards at a speed which is slightly less than normal without suffering severe discomfort."

9. I notice that a written submission was handed in the medical appeal tribunal by the claimant's representative and, bearing in mind the history of this case and the fact that this point as to analgesics had been raised at the stage of the earlier Commissioner's decision, I have no doubt that this particular issue was drawn to the medical appeal tribunal's attention. The question is then whether the claimant is right in alleging that they did not deal adequately with it in their decision, in the passage which I have quoted above. In my view something more needed to be said by the medical appeal tribunal about the effect of the analgesics, how long the claimant could be expected to take them, and what their effect was on his ability to walk. I have decided to accede to the claimant's submission that the tribunal did not deal fully with this particular issue. I therefore remit the case to a medical appeal tribunal which may be differently constituted from the previous two tribunals but it would not in my view matter, in view of the history of this case, if one or more members of the medical appeal tribunal were the same as on previous occasions.

10. I cannot stress too strongly that all issues of fact, medical opinion, diagnosis etc are entirely for the medical appeal tribunal and their decision on them is final. Appeal to the Commissioner is limited to questions of law. It is therefore for the new medical appeal tribunal to assess the claimant's walking ability under the terms of section 37A of the 1975 Act and regulation 3 of the Mobility Allowance Regulations 1975. The fact that a Commissioner has declared a tribunal's decision to be erroneous in law does not imply any or express any indication as to what the substantive result of the claim to mobility allowance should be. There appear to be suggestions in some of the claimant's representative's submissions that because the earlier Commissioner's decision declared the earlier tribunal decision to be erroneous in law then ex facie the claimant could expect a successful outcome at the next medical appeal tribunal. That is definitely not the position. It is entirely up to the medical appeal tribunal what decision it reaches and that applies equally to this decision.

11. As to the legal points that have been raised about the taking of analgesics or other medication, I accept what the claimant's representative says about the inapplicability certainly in this case, of regulation 41 of the Social Security (Claims and Payments) Regulations 1987, the material parts of which read as follows,

"Obligations of persons in respect of whom allowances are claimed or awarded and disqualification for failure to comply

41. (1) Subject to the following provisions of this regulation, every person, in respect of whom a claim for allowance is made or to whom mobility allowance has been awarded shall comply with every notice given to him by the Secretary of State which requires him either -
- (a) to submit himself to a medical examination by a medical authority for the purpose of determining any medical question as defined in regulation 53 of the Social Security (Adjudication) Regulations 1986; or
 - (b) to submit himself to such medical or other treatment as is available to him and is considered appropriate in his case by any medical authority to whose examination he has submitted himself in accordance with the foregoing provisions of this regulation, being treatment that may be expected to improve his condition so as to enable him to walk."

(Regulation 41(4) then provides for a disqualification for non-compliance with the Secretary of State's direction)

12. In my judgment, the claimant's representative's submissions are correct as to this regulation which does not, in my judgment, bear on the problem in the present case. The new tribunal will wish to ascertain as a matter of fact and in the exercise of their medical expertise to what extent the claimant is taking analgesics, how long he can continue to take them without any danger to his health and their effect on his walking ability. However, I do also hold in law that they are entitled to take into account the claimant's ability to walk when assisted by analgesics. Regulation 3 of the Mobility Allowance Regulations 1975 does not of course deal with this but does provide that the claimant's ability to walk when aided by a prosthesis or artificial aid is to be taken into account. But that does not in my view imply that his ability to walk assisted by the proper taking of analgesics is not to be taken into account. Many claimants for mobility allowance are in fact taking analgesics and it would be artificial in my view for a medical appeal tribunal to have to assess them as if they were not. If in fact a claimant is unable to take analgesics or the length of time for which he can safely take them at that dosage has expired, then that might well ground on the facts of the case a further claim for mobility allowance, It is, however, in my view artificial and incorrect to assert, as the claimant's representative does, that the medical appeal tribunal must regard the claimant's ability to walk, only as it would be if he were not taking analgesics.

13. As I have declared the medical appeal tribunal's decision to be erroneous in law on this ground, I do not need to deal in detail with all the other issues ventilated by the claimant's representative and by the Secretary of State. They largely relate to matters particular to the earlier medical appeal tribunal's decision. But my not commenting on them does not imply that I accept them. In particular it seems to me that the way in which the medical appeal tribunal in this case conducted the walking test was perfectly in order and I do not accept the claimant's representative's submissions on the facts and law of this particular point.

(Signed) M.J. Goodman
Commissioner

(Date) 22 March 1990