Mobility Allowance - adequate reasons for decision

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RAS/3/LS

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SOCIAL SECURITY ACTS 1975 TO 1986

APPEAL FROM DECISION OF MEDICAL APPEAL TRIBUNAL ON A QUESTION OF LAW

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Name: Margaret Anne Holbrook (Mrs) on behalf of David Marcus Holbrook

Medical Appeal Tribunal: Liverpool

Original Decision Case No: LI 39/1/85

[ORAL HEARING]

1. My decision is that the decision of the medical appeal tribunal dated 8 July 1985 is not erroneous in point of law.

2. On 27 March 1984 a claim for a mobility allowance for David then aged 14 was made on his behalf by his mother. According to the examining doctor's report of 12 April 1984 David had no speech, lacked communicational ability, was unco-operative and responded poorly to simple commands. He was hyperactive and lacked concentration. The basic disorder giving rise to David's problems was diagnosed as autism. In the doctor's view David was neither unable nor virtually unable to walk. An insurance officer disallowed the claim. There was an appeal to a medical board. They described the basic disorder as mental subnormality. In their view David did not satisfy the medical conditions for an award of mobility allowance. They said what David really required was an attendance allowance. There was then an appeal to a medical appeal tribunal. They decided that David's physical condition as a whole was such that he was virtually unable to walk and that he was entitled to a mobility allowance. This present appeal by the Secretary of State is with leave granted by the tribunal chairman. I directed an oral hearing. David's mother and father attended the hearing. The Secretary of State was represented by Mr D. Grieve and David's mother by Mr M. Rowland both of Counsel.

3. Section 37A(1) of the Social Security Act 1975 provides, so far as relevant to the issues in this case, that a person is 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. This is dealt with further by regulation 3 of the Mobility Allowance Regulations 1975 which provides -

> "3(1) A person shall only be treated, for the purposes of section 37A, as suffering from physical disablement such that he is either unable to walk or virtually unable to do so, if his physical condition as a whole is such that, without having regard to circumstances peculiar to that person as to place of residence or as to place of, or nature of employment -
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> (a) he is unable to walk; or
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> (b) his ability to walk out of doors is so limited, as regards the distance over which or the speed at which or the length of time for which or the manner in which he can make progress on foot without severe discomfort, that he is virtually unable to walk; or

(c) the exertion required to walk would constitute a danger to his life or would be likely to lead to a serious deterioration in his health.

(2) not relevant"

The tribunal gave as the reasons for their decision, including their findings on all material questions of fact the following -

> "We have heard [his parents] on behalf of David, and considered all the scheduled evidence, including the relevant regulations and the reports of Dr Smith dated 1.5.85, Dr Rosenbloom (undated) and J Dukes dated 21.6.78, handed in today.
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> Throughout the hearing David walked about the room aimlessly and without making any understandable communcation and betrayed marked hyperactivity and restlessness throughout the proceedings. On 2 occasions he attempted to leave the room, on the first of which he responded to being called back but had to be fetched the second.
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> We have heard detailed evidence from the parents upon his walking performance out of doors and in particular more often than not those occasions are accompanied by temperamental refusal episodes, these episodes occurring at distances varying between 20 and several hundred yards and on occasion makes progress impossible by sitting down. This evidence appears to have existed at the time of the original claim in March 1984 but is a facet of David's case which does not seem to have met with the previous attention of the Adjudicating Authorities.
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> We are satisfied that taking this aspect into account today David qualifies under Regulation 3(1)(b) by reason of the fact that his ability to walk out of doors is limited in the respects indicated above, such that he is virtually unable to walk."

Now the tribunal's decision was given after Lees v The Secretary of State for Social Services [1985] 1 AC 930 (H.L.) but before the decision of the Tribunal of Commissioners in CM/173/1985 (to be reported as R(M) 3/86 - and I will refer to it in this way throughout this decision) which, so far as relevant to David's case, explained how the principles in Lees applied in relation to cases like David's where the ability to walk is affected by behavioural problems. The application by the Secretary of State for leave to appeal also came before R(M) 3/86. What it said in effect was that the tribunal had misunderstood Lees and were wrong in law to take David's behavioural problems into account with regard to his ability to walk. Following the decision in R(M) 3/86 the Secretary of State made a further submission, with regard to the effect of that decision, that it was not clear from the reasons given by the tribunal whether David was unwilling or unable to walk during the periods he refused to walk and that the tribunal had therefore failed to explain the basis for their decision that David is virtually unable to walk.

4. In the Lees case the claimant was blind. She could walk in the sense of being able to place one foot in front of the other but she could not walk to any intended destination because she had no capability of directing where she was walking. She had no directional sense. The House of Lords nevertheless decided that she was not virtually unable to walk within the meaning of the legislation. So in the light of that the Secretary of State's application for leave to appeal was, as I have said, limited to the proposition that, because David could walk in the sense of being able to put one foot in front of the other, he could walk within the meaning of the legislation as explained by Lees, and the tribunal were wrong to decide that his behavioural problems which caused him to refuse to walk on occasions were relevant to his ability to walk. In fact, as was confirmed in R(M) 3/86, Lees had not dealt at least directly with David's sort of case i.e. the case of a person who could walk in the Lees sense but who would not walk because his state of mind deriving from his physical condition caused him to refuse to walk. R(M) 3/86 was the case of a child who had suffered from brain damage from birth leading to severe mental subnormality which gave rise to

behavioural problems. He could walk and indeed run but sometimes had to be physically restrained and at other times simply refused to move. The majority of the medical appeal tribunal had decided against him on the basis that he was physically capable of the act of walking and his behavioural problems had to be disregarded even though they caused the child not to walk. The Tribunal of Commissioners set aside that decision. They said (paragraph 10) -

> "Manifestly, the majority's decision was erroneous in point of law. It is clear from R(M) 2/78 that once it was established that Mark's behavioural problems, which included a failure on occasion to exercise his walking powers, stemmed from a physical disability, they were necessarily relevant. In so far as the majority took the view that they should be disregarded, they erred in point of law. It follows that we must set aside their decision, and direct that the appeal be reheard by a differently constituted tribunal. That tribunal will have regard to the extent of Mark's behavioural problems in so far as they impinge on his failure to walk. It may well be that they will be concerned, not merely with his conduct on the day when they examine him, but with the history of his condition in so far as it is relevant and in particular will require to know the frequency of his failure to walk, when required so to do."

In coming to their decision the Tribunal of Commissioners made the distinction (paragraphs 8 and 9) between on the one hand the child who makes a conscious choice to refuse to walk but whose refusal can be overcome as they put it by the promise of a reward or the threat of punishment, and on the other hand the child whose refusal derives from his physical disability. I am not sure whether the first case is simply that of the naughty child who refuses to walk. He in any event is plainly not a candidate for a mobility allowance. But the importance of R(M) 3/86 is, as it seems to me, that it makes clear that, in the case of a child who can walk perfectly well in the Lees sense but whose walking is disrupted by his unpredictable unwillingness or refusal to walk on occasions, provided the unwillingness derives from the physical condition and is not just naughty behaviour the unwillingness must be taken into account on the question of whether the child is virtually unable to walk. That, as the Tribunal reiterated, is a matter for the medical authorities.

5. The further submission made on behalf of the Secretary of State following the decision in R(M) 3/86 is by way of addition to the original submission and seems to leave the original submission in the case. That submission was, as I have said, to the effect that the tribunal were wrong in law to take account of David's behavioural problems which included his unwillingness to walk. That, as is now plain, is misconceived. There is therefore left in the case only the further submission that it is not clear whether David was unwilling or unable to walk during the periods he refuses to walk and that the tribunal failed to explain the basis of their decision that David is virtually unable to walk. The tribunal referred in their reasons to the "detailed evidence" from David's parents as to his walking performance out of doors and as to his "temperamental refusal episodes, these episodes occurring at distances varying between 20 and several hundred yards and on occasions makes progress impossible by sitting down". I have set out the rest of the tribunal's findings and reasons above. So what the Secretary of State is saying is that he does not know whether the tribunal took the view that this is the case of the child who made the conscious decision not to walk but could be coaxed to do so or whether it is the case of a child whose refusals are part of or connected with his overall physical condition. Now it is certainly a requirement that the reasons should explain the decision at least to the extent that the parties are able to see why the decision was reached; and a failure to do so is an error of law (see paragraph 14 of R(SB) 11/82 and the cases referred to). In my view however this tribunal did not fail in this respect. It is true that they referred to "temperamental refusal episodes" and Mr Grieve contended that this does not explain whether the refusals were as he put it voluntary or brought about by David's mental condition. Mr Rowland said that the reasons given by the tribunal had to be looked at in context. He said the object of the need to have clear reasons was to enable the parties to understand the basis on which the tribunal had reached its decision. There was no question that David suffers from autism and it has never

been in issue that that has a physical cause. The tribunal must have had physical disablement in mind because the Lees case and R(M) 1/83 were in the forefront of the Secretary of State's submission to them. In fact the chairman had made a note of both cases at the foot of the reasons. Mr Rowland went on to say that as it was not a matter of controversy that the claimant suffered from a physical disablement it was easy to see why the medical members had not thought to say so explicitly. In Baron and Secretary of State for Social Services (17 March 1986, unreported, at page 8 of the transcript) Lord Justice May dealing with whether the medical appeal tribunal in that case (also concerning a mobility allowance) had given sufficient reasons said that it was quite clear "...when one reads the Medical Appeal Tribunal's decision with any sense of discernment..." what they were finding. In the present case I take the view which largely accords with what Mr Rowland put to me that reading the decision with any sense of discernment it is clear that the tribunal were deciding the case on the basis of a child whose refusals to walk stemmed from his condition and were not dealing with the case of a child who could be coaxed. Indeed the evidence before the tribunal from David's father, as noted by the chairman, included the sentence that "Mother could not now budge him physical(ly) on the occasions that he refuses to walk". That is not it seems to me the case of a child who is open to coaxing. In my judgment in this case the tribunal gave adequate reasons. The Secretary of State's appeal must therefore fail. It has never been contended that the decision should be set aside as being unreasonable in the Wednesbury or Edwards and Bairstow sense and plainly the decision is not open to attack on that basis. The Secretary of State's appeal is disallowed.

(Signed) R A Sanders
Commissioner

Date: 21 January 1987