Terminating or not renewing award of M.A. - reasons (Fuller: ...) for not following earlier decision: Tribunals should relate findings to medical history as a whole.

Commissioner's File: CM/205/1988
Region: North Eastern

SOCIAL SECURITY ACTS 1975 TO 1986
CLAIM FOR MOBILITY ALLOWANCE
DECISION OF A TRIBUNAL OF COMMISSIONERS

George Fuller.

[ORAL HEARING]

1. We hold the decision of the medical appeal tribunal sitting at Newcastle-upon-Tyne dated 14 January 1988 to be erroneous in law. The claimant's case should be heard afresh by a differently constituted medical appeal tribunal: Social Security Act 1975, section 112.

2. The case concerns renewal of mobility allowance. The claimant had been awarded such an allowance, due to expire on 14 May 1987. He sought a renewal. The Chief Commissioner directed that the claimant's appeal from an adverse decision of the medical appeal tribunal be heard by a Tribunal of Commissioners. In that direction the Chief Commissioner directed attention to decisions R(A) 2/83 and R(A) 1/84 where in attendance allowance cases Commissioners determined that clear and adequate reasons for terminating or not renewing an existing award should be given and to two decisions on Commissioners' files CM/6/85 and CM/104/85 where the same determinations had been made in regard to mobility allowance renewal claims and also to that on file CM/55/88 where a contrary view had been expresed.

Thus it came about that this case was before us for oral hearing. At it the claimant was represented by Mr M Rowland, of Counsel, instructed to the North Tyneside Disability Advice Centre, and the Secretary of State was represented by Mr J Latter, of Counsel, instructed by the Solicitor's Office, Departments of Health and Social Security. We are grateful to both Counsel for the assistance they afforded us in dealing with the main issue in this case. That issue was the extent to which, if at all, a medical appeal tribunal in refusing renewal of a mobility allowance requires to take account of the fact of the existence of a previous award of such an allowance and the weight, if any, to be attached to that fact.

4. Turning, first, to the history of the case, so far as now relevant, an adjudication officer had referred the medical questions arising on the application for renewal to a medical practitioner who reported, on 9 March 1987, after a detailed clinical examination, that the claimant was virtually unable to walk. The adjudication officer then referred the medical questions arising to a medical board who on 21 September 1987 reported adversely to the claimant. The claimant did not attend the board but they had the benefit of a report dated 3 April 1987 from the claimant's general practitioner who intimated that he did not feel that the claimant's walking ability was impaired. They also had the benefit of a report dated 21 July 1987 from a consultant orthopaedic surgeon in whose care the claimant had been since 1985. He reported the diagnosis of cervical and lumbar spondylosis with asthma;

that the claimant's present condition appeared to be static but that there was evidence of pain and discomfort on walking; that he was of opinion that the claimant was likely to have continued problems on exertion and that the natural history of such spondylosis was one of slow deterioration with exacerbations and remissions. He outlined the current and projected future treatment and negatived the question whether the exertion of walking would be likely to cause a danger to life or lead to a serious deterioration in health. The general practitioner had reported on a current condition of cervical spondylosis and asthma. The examining medical practitioner had diagnosed as the basic disorder giving rise to the lack of walking ability, cervical spondylosis and depression. The medical board accepted as giving rise to a lack of walking ability both the asthma and the cervical and lumbar spondylosis. The claimant appealed the board's decision.

5. The medical appeal tribunal had before them the reports noted above. They also had the examining medical practitioner's report dated 17 June 1985 which gave rise to the award of mobility allowance. That report found the claimant virtually unable to walk and diagnosed as the basic disorder giving rise to lack of walking ability, cervical and lumbar spondylosis. The tribunal also had a previous examining medical practitioner's report dated 21 November 1984 which had found the claimant not virtually unable to walk although accepting that he suffered from cervical spondylosis and that that gave rise to some lack of walking ability. The tribunal also had an examining medical practitioner's report dated 12 October 1984 dealing with the claimant's war pensioner's mobility supplement. So far as relevant to this case that report also found the claimant to suffer from cervical and lumbar spondylosis which contributed to his lack of mobility.

6. The tribunal confirmed the decision of the medical board. They gave as their findings and reason for decision -

> "We read the papers, heard the claimant and saw him walk inside and outside a distance of approximately 100 yards. He made good progress and although he complained of some back ache this did not prevent him walking and there was no evidence of respiratory distress. He walked with a stick."

The tribunal's record of proceedings does not state whether or not the claimant was medically examined. And although the chairman's note of statements and evidence is not clear, it does appear that the claimant was relying upon the consequences of his back and neck conditions as giving rise to such a lack of walking ability as to entitle him to a renewal of his mobility allowance. He submitted to the tribunal a statement in writing that his complaint was no better than it had been two years previously and he asked that if it was thought his condition had improved that that should be recorded in writing. In support he lodged a letter from his general practitioner recording that the claimant was still suffering from cervical and lumbar spondylosis and asthma and that indeed the condition of the claimant had not recently improved.

7. It is also necessary that we should record, albeit briefly, our views upon the ground of appeal advanced for the claimant in his written submission. Apart from making the point that the tribunal had failed to explain why they had reached a different conclusion from the earlier awarding decision the submission centred upon the evidence, and that in particular of the consultant orthopaedic surgeon, that there was pain and discomfort on walking. It was contended that the tribunal had failed to explain why that evidence had been rejected. On that the submission for the Secretary of State was that the tribunal had indeed failed to indicate whether they had accepted the contention of the claimant that he did suffer pain and discomfort, and further, how they viewed that in light of the statutory test and what they found about the effect, if any, that that had on his ability to walk. We accept and uphold these submissions. Section 37A of the Social Security Act 1975 entitles a person to a mobility allowance for any period throughout which he is suffering from physical disablement such tht he is either unable to walk or virtually unable to do so. There was no suggestion in this case that the claimant was unable to walk. Virtual inability to walk is

defined for the purpose of that section, so far as relevant to this case, by regulation 3(1)(b) of the Mobility Allowance Regulations 1975, as amended. That sub-section provides that an individual is virtually unable to walk if -

> "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."

From that it is clear that the first question is as to whether there is any discomfort caused by an individual's efforts to walk. The second question is whether that discomfort can properly be described as "severe" and the third question is whether that severe discomfort, if it exists, limits his ability to walk out of doors as regards distance, speed, length of time, or manner in which progress can be made on foot. The final question is whether he is on account of that limitation of ability to walk out of doors properly to be regarded, as a matter of the normal use of the words, as virtually unable to walk. The first two questions are key points in the case and regulation 31(4) of the Social Security (Adjudication) R lations 1986 requires a medical appeal tribunal to record in their decision both a ment of the reasons therefor and also their findings on all questions of fact material to that decision. Thus where, as here, a claimant contends that he can only walk with discomfort it is necessary for the tribunal to record as a fact whether they accept that discomfort and, if so, how they view it in degree - that is to say whether they regard it as being "severe". No fact is found in this case about discomfort but equally no reason is recorded for rejecting the evidence that there was on that point. For this reason alone there has been an error in law and so the tribunal decision cannot stand.

8. But the major question for us, and the major subject of submission before us, was as to the extent of reasons (if any) which a medical appeal tribunal should give for not granting a 'renewal' of mobility allowance immediately following the expiry of a previous award. Authority that such reasons are not "automatically" required is contained in Decision CM/54/88 (unreported). In that case, again concerning a claim for renewal of an existing award of mobility allowance, the Secretary of State made a submission that a claimant should be able to see why a claim subsequent to a previous award was unsuccessful. That claimant did not specifically raise a point about that. In holding that in a renewal claim there is no automatic obligation upon a tribunal to explain why a claimant is being held then unable to comply with the conditions for an award whereas another tribunal at an earlier te had held that then he was, the Commisisoner distinguished the Attendance Allowance oard cases R(A) 2/83 at paragraph 5 and R() 1/84 at paragraph 9. There it had been laid down that on a renewal application for that allowance, if it is to be held that the conditions for an award are not satisfied, given an earlier satisfaction, then that can only be either on the ground that the previous certification was mistaken or on the ground that there had been a change of circumstances. Where, then, there was a contention that there had been no change since the previous award it was held necessary for the Attendance Allowance Board to express such disagreement or to find that there had been a change. We pause to observe that that view has been endorsed as recently as in the decision on file CA/80/87. But that was all distinguished in CM/154/1988 upon the basis that in mobility allowance claims there was a personal examination by the medical members of the tribunal, unlike in attendance allowance cases before the Board or its delegate. That, it was submitted to us in the first place, on behalf of the claimant, to be a distinction without a difference or at any rate not a sufficient distinction to warrant a different rule. We agree. It is not mandatory upon a medical appeal tribunal to make a medical examination: it is open to them to do so, but in practice many mobility allowance appeals are determined by tribunals without such an examination. Indeed, in this case, the medical board had proceeded without a medical examination.

9. It was argued for the claimant that the giving of reasons on this point could also be important for both the Secretary of State and subsequent medical boards in the event of a later review. If a review was under consideration upon the basis of for example mistake of

fact or change of circumstance it would be necessary to know what were the facts or circumstances taken into account by the tribunal. Similar considerations would apply if the review was on the grounds of some error. We agree. The basis of a tribunal decision must be sufficiently fully recorded and explained so as to make clear to the parties why they have won or lost.

10. After consideration, we are satisfied that the decision on file CM/5/1988 should not be followed and that the views on the files CM/6/85 and CM/104/85, at paragraphs 7 and 6 respectively (see paragraph 2 of this decision) correctly state the law. Accordingly we hold that in a mobility allowance case an adjudicating authority, including a medical appeal tribunal, must take into account and cannot ignore the fact of and the medical findings and opinions relating to the previous award which is sought to be renewed.

11. The more difficult question arises in regard to the extent to which facts have to be found and reasoning recorded related or relating thereto, where a tribunal is refusing, or endorsing a refusal of, a renewal application. On this aspect we were favoured with persuasive and quite wide ranging submissions contending, on the one hand and as advanced by Mr Rowland, that there was something approaching, if not indeed amounting to, a presumption in favour of a claimant holding an existing award so that something positive would have to be found by the tribunal to justify what amounted to its removal, albeit by way of a refusal of renewal. That, it was submitted would not impose a heavy burden. Difficulty would mainly rise only in cases where there was a general downhill progression of the condition suffered by the claimant, and those where there were fluctuations in the condition, so that one day might not be a fair basis alone upon which to form a judgment. It would be necessary in these cases to show that the findings made by the tribunal on a day had been properly related to the background, which background, no doubt, had earlier warranted the original award. There could be simpler cases where a change of circumstances was found and would justify a refusal of renewal. Mr Rowland relied on a passage in Decision R(A) 2/83, at paragraph 5,

> "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."

12. Mr Latter agreed that some explanation for 'non-renewal' was required but it was not necessary for a tribunal to go so far as to reconcile their position with that as found when the allowance was granted such as, for example, holding that no reasonable medical authority could have granted the allowance. It would be enough to say that they disagreed, and why they disagreed only if that was not patent. He contended that it was not necessary for a tribunal to go into enormous detail, citing a passage by May L.J. as recorded in an appendix to Decision R(M) 6/86, a mobility allowance case, at page 11 E-F of the appendix.

> "It would be an almost intolerable burden on medical appeal tribunals, in deciding cases of this nature as distinct from other types of cases, if they had to make specific findings of distances which people could walk and the extent to which breathlessness and pain caused them to stop."

13. Against that background and having taken into account that 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 a 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 a 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 be sometimes 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 be 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.

14. The appeal succeeds.

(Signed)
M J Goodman
Commissioner

(Signed) R A Sanders
Commissioner

(Signed) W M Walker
Commissioner

Date: 4 April 1989