

MJG/SH/6.

Commissioner's File: CM/208/1989

SOCIAL SECURITY ACTS 1975 TO 1990
CLAIM FOR MOBILITY ALLOWANCE
DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. I allow the claimant's appeal against the decision of the medical appeal tribunal dated 20 February 1989 as that decision is erroneous in law and I set it aside. I remit the case for rehearing and redetermination by an entirely differently constituted medical appeal tribunal: Social Security Act 1975, section 112 (as amended).

2. This is an appeal to the Commissioner on behalf of the claimant, a girl born on 14 July 1980. The appeal is against the decision of a medical appeal tribunal dated 20 February 1989 which dismissed the claimant's appeal from a decision of a medical board dated 7 October 1988 to the effect that the claimant did not (in regard to a claim dated 24 November 1986) satisfy the medical conditions for an award of mobility allowance (to be found in section 37A of the Social Security Act 1975 and regulation 3 of the Mobility Allowance Regulations 1975).

3. Appeal to the Commissioner in this jurisdiction lies only on questions of law. On all issues of fact, medical opinion, diagnosis, assessment of walking ability etc the decision of the medical authorities is final and cannot be subject to appeal.

4. In the present case the chairman of the medical appeal tribunal refused leave to appeal to the Commissioner but a Commissioner gave leave. There is a difference of opinion between the written submissions in this case. On the one hand the written submission by the claimant's representative submits that for a number of reasons the tribunal erred in law but a written submission dated 31 August 1989 on behalf of the Secretary of State submits for detailed reasons that the medical appeal tribunal did not err in law.

5. It is apparent to me from the careful record of decision in this case (on form MY365A) that the medical appeal tribunal took

considerable trouble with this case and it is only after some consideration that I have decided that I must set their decision aside as being erroneous in law in one respect. That arises from paragraph 1 of the grounds of appeal to the Commissioner reading as follows,

"At the very start of the hearing [the claimant's] father was asked whether or not he wanted [the claimant] to have an outside walking test. It was a very cold and windy day. Therefore my husband said that he did not want an outside walking test and agreed to a test indoors. This was because he knew that [the claimant] would probably turn blue if she had to walk outside, that walking in such conditions adversely affected her ability to walk and was quite distressing for her. Our representative later explained at length that [the claimant] rarely goes out on cold and windy days because she has a tendency to turn blue. The representative also emphasised the point that [the claimant's] capacity for walking ranged from day to day and was very much worse in cold or windy weather. My husband verified these facts when questioned. Therefore I cannot understand why this is not mentioned in the decision nor can I understand how the tribunal has reached its conclusion that, 'in our opinion the conditions from which the claimant suffers are not as would alter her capacity for walking out of doors compared with her capacity for walking indoors'".

I should explain at this juncture that the difficulty for the young claimant in walking arises out of the fact that she suffers from "C.H.D. pulmonary atresia". It appears that she was born with a congenital heart defect.

6. In their reasons for decision the medical appeal tribunal said,

"[The claimant's representative] said that [the claimant's] walking ability varied from 80 yards on a bad day to 3/400 yards on a good one. There was always discomfort. She tended to get breathless and tired and had to stop. She also had leg pain. Her father confirmed the various operations [the claimant] has had saying that she appeared to be going blue. It was agreed that [the claimant] should walk in the corridor outside our room. She walked quickly over about 50 yards without apparent discomfort and with no evidence of distress. In fact she looked to us to be remarkably cheerful."

7. The Secretary of State's written submission, dated 31 August 1989, draws attention to the fact that at the conclusion of their reasons for decision the medical appeal tribunal said, "In our opinion the conditions from which the claimant suffers are not such as would alter her capacity for walking out of doors compared with her capacity for walking indoors." It appears however from the actual record of decision that is before me that that is part of a common-form decision. It is perfectly proper of course for such a form to be used.

Nevertheless, I have to bear in mind in the present case that there was a specific contention before the tribunal as to the claimant's ability to walk out of doors, particularly in cold or windy weather. It is, of course, well established that the ascertainment by the medical appeal tribunal of the claimant's ability to walk out of doors is entirely a medical matter for the tribunal. However, what is in issue here is whether the tribunal gave adequate reasons for its decision, bearing in mind the specific contention that was made to it as to the claimant's difficulty in walking out of doors in cold weather.

8. In this regard the Secretary of State's submission (paragraph 5 of submission of 31 August 1989) submits,

"The claimant contends that it was explained to the MAT that the claimant's outdoor walking capacity was very much worse in cold or windy weather and varied from day to day. It is submitted that external factors such as extremes of weather conditions cannot be taken into account by an MAT in assessing outdoor walking ability as only ordinary weather conditions are relevant (see paragraph 6 of CM/247/87). It is submitted that no error of law turns on this ground of appeal."

9. In fact, paragraph 6 of the Commissioner's decision, on file CM/247/1987, reads,

"There is a further observation which I should make. It relates to paragraph 4 of the Secretary of State's representative's submission in which it is stated that external factors, such as weather conditions cannot be taken into account by the medical appeal tribunal when assessing a claimant's walking ability. It appears to me that that is too widely expressed and that ordinary weather conditions must be relevant to the question of ability to walk out of doors."

10. It seems to me that the learned Commissioner was not saying "that external factors such as extremes of weather conditions cannot be taken into account by an MAT", as submitted on behalf of the Secretary of State. Of course everyone may have difficulty in walking in hurricane-like gales, such as those which have unfortunately struck Great Britain in recent years. No one would expect walking ability to be assessed in the light of such conditions. However, it could hardly be said that a cold windy day is uncharacteristic or uncommon in this country. If a contention is made to, and evidence is led to, a medical appeal tribunal that a young claimant like this would have difficulty in walking in such conditions because of a heart condition, then it is I think incumbent on the tribunal in its reasons for decision to make some reference to this specifically and not merely to adopt a common form of statement such as that quoted above.

11. I have ultimately decided therefore that the tribunal's not giving reasons specifically directed to this particular matter

does constitute an error of law in that it is a breach of regulation 31(4) of the Social Security (Adjudication) Regulations 1986. The claimant and her parents and adviser were entitled to know what the medical appeal tribunal thought about this particular contention. Consequently, in accordance with the normal rule as now laid down by the amendments made by the Social Security Act 1989 to section 112 of the Social Security Act 1975, the case must be reheard and redetermined by an entirely differently constituted medical appeal tribunal. My having allowed this appeal on the ground of error of law does not of course constitute any opinion by me (which in any event I would not be qualified to hold) on whether or not in substance the claim to mobility allowance should succeed. That is entirely a matter for the new medical appeal tribunal. I ought also to add that, as I have set the medical appeal tribunal's decision aside on the grounds stated above, I have not felt it necessary to refer to the various other matters put forward in support of the appeal by the claimant's representative and which are in fact controverted by the Secretary of State's submission of 31 August 1989.

(Signed) M.J. Goodman
Commissioner

(Date) 15 November 1991