

Claim for MA received on claimant's 65th birthday - he is
"over the age of 65". Walking ability must be considered in relation
to period immediately before that date

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MJG/SH/7

Commissioner's File: CM/241/1991

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 social security appeal tribunal dated 16 July 1990 as that decision is erroneous in law and I set it aside. I remit the case to the adjudication officer: Social Security Act 1975, section 112 (as amended).

2. This is an appeal to the Commissioner by the claimant, a man born on 26 July 1924 (the date is important - see below). The appeal is against the decision of a medical appeal tribunal dated 16 July 1990, which dismissed the claimant's appeal against a decision of a medical board dated 29 November 1989, to the effect 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).

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 appeal tribunal is final. It follows that my having allowed this appeal because of an error of law by the medical appeal tribunal (see below) does not imply any opinion by me on whether or not in substance the claim to mobility allowance should succeed. Moreover, the grounds of appeal of the claimant as to his medical state do not raise issues of law. I accept paragraphs 4-6 of a written submission dated 22 November 1991 on behalf of the Secretary of State to that effect. I also accept paragraph 3 of that submission, to the effect that no error of law is shown by the claimant's contention that there was a falsification of records and intention to defraud him in determination of his mobility allowance claims. It is quite clear that there is nothing of the kind in the papers, or elsewhere.

4. However, after earnest consideration, I do accept paragraph 7 of the Secretary of State's submission dated 22 November 1991 that there was an error of law on the part of the medical appeal tribunal. That paragraph reads as follows,

"It is submitted that in this case the MAT have wrongly interpreted the Acts and Regulations in determining the medical questions from 26 July 1989 instead of 25 July 1989, the day before the claimant's 65th birthday. Regulation 53(e) of the Social Security (Adjudication) Regulations 1986 [S.I. 1986, No. 2218]."

The claimant himself has made no submissions on this particular point.

5. I first recite the facts relevant to this contention. The claim for mobility allowance was received by the Secretary of State on 26 July 1989, which was the claimant's 65th birthday. The date of receipt and not the date of signature of the claim form (24 July 1989) is the relevant date (section 37A(2A) of the Social Security Act 1975).

6. The medical appeal tribunal dealt with the matter in this way. In their reasons for decision, they said as follows,

"We had regard to [the claimant's] walking ability as at 26 July 1989 the date of his 65th birthday. ... we credit that on 26 July 1989 he would have been more affected by the ulcer on his left leg than he was today when it caused no pain at any time. We have also taken into account that today was mild and warm."

7. The Secretary of State's submission is in a sense therefore that the medical appeal tribunal assessed the claimant's walking ability one day too late i.e. on his actual 65th birthday on 26 July 1989, instead of the day before that birthday. That may seem a rather technical point but it is one which I am bound to consider as the Secretary of State has submitted it to me.

8. The relevant law is as follows. Section 37A(5) of the Social Security Act 1975 provides,

"S.37A (5) No person shall be entitled to claim mobility allowance -

(a) in respect of a period in which he is under the age of 5 or over the age of 80 [at the relevant time 75]

(aa) in respect of a period in which he is over the age of 65 but under the age of 80 [at the relevant time 75] unless either -

(i) he had been entitled to a mobility allowance in

respect of a period ending immediately before the date on which he attained the age of 65; or

(ii) he would have been so entitled but for paragraph (b) below and a claim for the allowance by or in respect of him is made before the date on which he attained the age of 66;

(b) except in prescribed cases, for any week before that in which a claim for the allowance by or in respect of him is received by the Secretary of State."

9. Regulations 53 and 54 of the Social Security (Adjudication) Regulations 1986, S.I. 1986, No. 228 (as amended by S.I. 1988, No. 1725) provide as follows,

"Definition of 'medical question'

53. In this Section any question arising in connection with a claim for or award of mobility allowance -

(a) whether a person is suffering from physical disablement such that he is either unable to walk or virtually unable to do so at the date the claim is received or treated as received or at any subsequent date up to the date the question is determined, and if so, what date; or

(b)-(d)

(e) which would have been a question under paragraphs (a), .. on the day before he attained 65, in the case of a person who is over the age of 65 but under the age of 66 at the date on which the claim is received or treated as received,

is referred to as a medical question.

Date for the determination of the medical questions

54. In determining any medical question except a question under regulation 53(e) on a claim for mobility allowance, an adjudication officer, medical board or medical appeal

tribunal shall have regard to the physical disablement of the person in respect of whom the claim is made at the date at which the claim is received or treated as received by the Secretary of State ..."

10. The question thus raised is whether, if the claim as here is received exactly on the claimant's 65th birthday, the claimant needs the assistance of section 37A(5)(aa) of the Social Security Act 1975, i.e. whether "he is over the age of 65" and whether that is a case where there applies the special rule for adjudication in regulation 53(e) of the Adjudication Regulations, again depending on whether "a person .. is over the age of 65". In ordinary parlance it might well be said that a person is not "over the age of 65" until at least he has completed the whole of his first day of his 65th birthday. That, however, is not the position under the social security legislation. That is because Schedule 20 to the Social Security Act 1975, containing a relevant glossary of expressions (see section 168(1) of the Act), has the following entry,

<u>" Expression</u>	<u>Meaning</u>
'Age'.....	For purposes of this Act, a person - (a) is over or under a particular age if he has or, as the case may be, has not attained that age; (b) {...}

11. That means that on the date of receipt of the claim for mobility allowance on the claimant's 65th birthday he will be regarded on that day as being "over the age of 65". At that point there then comes into play the general rule in section 9(1) of the Family Law Reform Act 1969 (c.46), altering the case-law rule that one attained a given age on the day before one's birthday, and providing,

" 9. Time at which a person attains a particular age

- (1) The time at which a person attains a particular age expressed in years shall be the commencement of the relevant anniversary of the date of his birth."

12. Section 9(1) of the Family Law Reform Act 1969 means that the claimant attained the age of 65 years actually on his 65th birthday on 26 July 1989. Then by virtue of the entry in Schedule 20 to the Social Security Act 1975 (cited above) he is

regarded as being "over the age of 65". It follows that he would need the assistance of section 37A(5)(aa) in order to succeed in any claim for mobility allowance. That means, as a combination of subsection (5)(aa) and regulations 53 and 54 of the above-cited Adjudication Regulations (see para.9 above) that the medical appeal tribunal would have to assess his walking ability to ascertain whether "he had been entitled to a mobility allowance in respect of a period ending immediately before the date on which he attained the age of 65" (section 37A(5)(aa)(i)) - my underlining. The medical appeal tribunal did not do so. They assessed the claimant's walking ability simply as on his actual 65th birthday, 26 July 1989. I have considered whether or not this is simply a venial error and that it might be said to be apparent from the medical appeal tribunal's decision that they were in fact assessing the claimant's walking ability according to the statutory provisions. However, 37A(5)(aa)(i) of the 1975 Act speaks of "the period ending immediately before the date on which he attained the age of 65" (my underlining). To assess the claimant's walking ability as on his 65th birthday is one thing. To assess it in respect of the period ending immediately before that 65th birthday is technically at least, and possibly also substantially in some cases, another thing. After some thought therefore, I have decided that I must set the medical appeal tribunal's decision aside on this ground.

13. In view of what I have said above, I have been able to decide this case without the need for an oral hearing as requested by the claimant in his written observations dated 4 February 1992 and I therefore formally refuse that request.

(Signed) M.J. Goodman
Commissioner

(Date) 19 March 1992