MA3A — Severe Discomfort

Commissioner's File: CM/267/93

SOCIAL SECURITY ACTS 1975 TO 1990

SOCIAL SECURITY ADMINISTRATION ACT 1992

CLAIM FOR MOBILITY ALLOWANCE

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Name: H G

Appeal Tribunal: Manchester

Case No: M/657/03/90

1. The claimant's appeal is allowed. The decision of the Manchester medical appeal tribunal dated 15 October 1990 is erroneous in point of law, for the reasons given below, and I set it aside. The appeal is referred to an adjudication officer for determination in accordance with the directions given in paragraph 16 below (Social Security Administration Act 1992, section 48(5), as modified by regulation 24(13) of the Social Security (Introduction of Disability Living Allowance) Regulations 1991).

2. The background

The claimant claimed mobility allowance on 18 January 1989. He was examined by a medical practitioner on 16 February 1989. He was recorded as having said that he had to stop and rest after 200 yards walking because of pain in the lower back. The medical practitioner's opinion was that the claimant could walk in excess of 200 yards at a reasonable pace and was not able or virtually unable to walk.

3. The claimant appealed to a medical board, which examined him on 1 September 1989. Then he was recorded as saying that on a good day he could walk about 200 feet before having to stop because of pain down the left side. He would be able to continue for a shorter distance after a rest of two to six minutes. The medical board's opinion was that the claimant could walk in excess of 100 yards without severe discomfort and was not unable or virtually unable to walk.

4. The claimant appealed to the medcial appeal tribunal. He attended the hearing on 15 October 1990 and was represented by Mr J Lyons of Stockport Welfare Rights Unit. Mr Lyons had prepared a written submission whcih was put in to the appeal tribunal. Among the points made in that submission were that the claimant stated that he always had some degree of back pain, which became more severe on walking. After a short distance he would experience a locking sensation in his hips and a pain would spread down his legs from the hips to the calves. The claimant also said that he was confused between feet and yards in giving his statement to the medical practitioner on 16 February 1989 and gave the correct figure to the medical board. The claimant estimated that in February 1990 he would need to stop at least once in walking 200 feet. The submission also mentioned problems of breathlessness due to bronchitis, which would come on if the claimant pushed himself to continue walking through pain. The claimant also gave evidence to the appeal tribunal, was medically examined and was observed walking indoors.

5. <u>The medical appeal tribunal's decision</u>

The appeal tribunal confirmed the medical board's decision. The decision form MY365 did not have separate boxes for the recording of the appeal tribunal's findings of fact and reasons for decision. The combined statement of reasons and findings was as follows:

> "We considered all the scheduled evidence and heard submissions from Mr Lyons on behalf of the claimant. Mr Lyons handed to us a written submission which the claimant accepted as factually correct. We note the additional problem of bronchitis mentioned in the statement. We considered all the scheduled evidence and heard evidence from the claimant who told us that his walking is limited by pain starting in the lower back above both buttocks and extends down both legs. He is limited in the amount of medication he can take, because of his stomach condition. He has seen a consultant at Stockport who told him his back condition is inoperable. We accept the claimant's evidence that he can walk 200 feet (66 yards) before having to stop because of increasing pain.
>
> We saw the claimant walk a distance of 30 yards in a corridor adjacent to the tribunal room. He walked with a stick in the right hand with a right side limp. He did not appear to be in any significant distress.
>
> We make allowance for the fact that we saw the claimant walk in a corridor and not out of doors.

Examination today substantially confirms the clinical findings of the Board of 1.9.89. We also examined the claimant's chest. There was minimal wheezing on forceful expiration, otherwise normal.

We accept that the claimant's walking is limited and accompanied by some pain and discomfort. However, having considered all the evidence, and after clinical examination of the claimant, and seeing him walk, it is cur opinion that at all times since 18 February 1989 there has been no physical reason to prevent the claimant from being capable of a significant degree of walking without severe discomfort and he is not therefore virtually unable to walk so as to satisfy Regulation 3(1)(a)(ii).

The claimant is not unable to walk and therefore does not satisfy Regulation 3(1)(a)(i).

In our opinion the exertion of walking would not constitute a danger to his life or be likely to lead to a serious deterioration in his health.

The claimant has not at any time since 18 January 1989 satisfied the medical requirements for an award of Mobility Allowance."

6. Subsequent proceedings

Mr Lyons applied on the claimant's behalf to have the appeal tribunal's decision set aside, or, if that was not successful, for leave to appeal to the Commissioner. On the first application, the claimant disputed the distance which he had walked in the corridor and submitted that the very short walking test was not an adequate basis for the decision. A medical appeal tribunal on 22 January 1991 refused to set aside the decision of 15 October 1990. Since, by virtue of regulation 12(3) of the Social Security (Adjudication) Regulations 1986, there is no appeal against such a refusal, I am not directly concerned with the appeal tribunal's reasons, but one matter was mentioned which has subsequently caused disquiet. That was in relation to regulation 11(1)(c) of the Adjudication Regulations ("the interests of justice so require"), where the appeal tribunal wrote, "In regard to the accepted evidence of 66 yards walking distance the Tribunal takes into account Commissioner's decision CM/047/1986."

7. On the second application, the chairman of the appeal tribunal of 15 October 1990 refused leave to appeal (see page 37 in the papers before me: the date of 21 January 1991 was clearly intended to be the same as the date of the refusal of the application to set aside). It appears that notice of the chairman's refusal may never have been given to the claimant or his representative, but in any event on 28 February 1991 the claimant applied to the Commissioner for leave to appeal.

Unfortunately, the claimant's papers were misplaced and it was not until 18 October 1993 that a Commissioner granted leave. The grounds of the claimant's application were that he was left not knowing whether he was believed or not, since the appeal tribunal had accepted his evidence that he had to stop walking after 66 yards because of pain, yet found that there was no physical reason why he should not be capable of a significant degree of walking without severe discomfort. In addition the appeal tribunal made no reference to the claimant's bowel problems and the setting aside decision implied that decision CM/47/1986 was in the minds of the appeal tribunal of 15 October 1990, but had not been mentioned in any submissions or during the hearing or been made available to the claimant or his representative.

8. The submission dated 8 November 1993 on behalf of the Secretary of State was that the appeal tribunal of 15 October 1990 had not erred in law and had provided sufficiently clear findings and reasons. It was submitted that what constitutes an inability to walk to any appreciable extent (i.e. a virtual inability to walk) was a matter of fact for the appeal tribunal to determine in its medical expertise and that whether a claimant experiences pain and whether that pain amounts to severe discomfort is a matter of medical opinion. The appeal tribunal had accepted that the claimant had a physical disablement, but had concluded that his ability to walk 66 yards before being stopped by pain was a significant degree of walking without severe discomfort. Since the appeal tribunal accepted the claimant's evidence as to how his condition affected him, there was no reason to doubt that it took his bowel condition into account.

9. In the observations in reply dated 13 December 1993 Mr Lyons submitted that the question of pain and severe discomfort was one of fact, on which a medical appeal tribunal must be seen to make a decision. He returned to the apparent reliance on CM/47/1986. Then he submitted that both the appeal tribunal and the Secretary of State's representative had misapplied the test of virtual inability to walk without severe discomfort, in that they assumed that the claimant's discomfort only became severe at the point at which he had to stop walking. I should set out the following paragraphs of the observations in full.

   8. "It is, perhaps, easiest to make the point by identifying four possible stages that [the claimant] may go through:-

      a) walking without discomfort;

      b) walking with discomfort which is not severe;

      c) walking with discomfort which is severe;

      d) not walking.

9. The way in which the Secretary of State's representative has presented the tribunal's decision has the effect of denying the existence of stage (c) in the above process. In [the claimant's] case, it is submitted that he does not experience stage (a), that he starts walking at either stage (b) or stage (c) - a question of fact which perhaps has not been adequately determined - and proceeds through those stages to stage (d).

10. I accept that there may be some people who stop walking at stage (b), although as a matter of common sense I would have thought that this was the exception rather than the rule. At all events, there is no evidence that [the claimant] falls into this category. Therefore I submit that the tribunal erred in law - following R(M) 1/81 - by failing to assess how much of his walking was accomplished only with severe discomfort and by failing to disregard wich accomplishments."

10. Was the appeal tribunal's decision erroneous in point of law? I have concluded that it was. I accept the substance of Mr Lyon's submission on severe discomfort set out in the previous paragraph. In R(M) 1/81, approved by the Tribunal of Commissioners in R(M) 1/83 (at paragraph 26), it was held that the effect of regulation 3(1)(a)(ii) of the Mobility Allowance Regulations 1975 was that one should consider what are the limits of the claimant's ability to walk out of doors without severe discomfort and ignore

> "any extended outdoor walking accomplishment which the claimant could or might attain only with severe discomfort."

If an appeal tribunal were to apply a test that discomfort only becomes severe when it is so great as to preclude walking, it would adopt the wrong legal test. In the present case, it may be that the appeal tribunal did apply the correct legal test, but it did not make it sufficiently clear that it had done so. Nor did it make sufficiently precise findings of fact as to whether any of the 66 yards outdoor walking of which it found the claimant capable was achieved only at the cost of severe discomfort. In my judgment, that was a breach of the requirements of regulation 31(4) of the Social Security (Adjudication) Regulations 1986.

11. In my view, that conclusion is consistent with the judgment of the Court of Appeal in Kitchen and others v Secretary of State for Social Security (30 July 1993). There Neill L J held that regulation 31(4) of the Adjudication Regulations requires medical appeal tribunals to record the medical questions which they are required to answer and give answers directed to those questions. In considering the questions to be addressed in mobility allowance cases he said (at page 35 of the transcript) -

> "In addition, the medical appeal tribunal will have to decide the question of inability or virtual inability to walk by reference to the considerations set out in regulation 3(1)(a)(ii) and (iii) of the Mobility Allowance Regulations. The medical appeal tribunal may therefore have to consider whether walking involves discomfort and whether the exertion required to walk would either constitute a danger to life or be likely to lead to a serious deterioration in the claimant's health."

Although Kitchen was not referred to in any of the written submissions I considered that in the circumstances it was not necessary to impose the further delay of asking for observations on its effect.

12. There was also some doubt about the test applied by the appeal tribunal raised by its use of the words "significant distress" in its description of the walking test. In Cassinelli v Secretary of State for Social Services (Court of Appeal, 29 November 1991) a medical appeal tribunal had recorded in its description of a walking test that there was "no evidence that the exertion caused severe pain or distress." It was submitted that the appeal tribunal had by inference found that there was no severe discomfort. Glidewell L J said (at page 7B of the transcript) -

> "For my part I cannot accept that submission. If that were correct, then first of all I can see no reason why the Tribunal should not have used the word "discomfort"; secondly, the phrase "severe pain or distress" sesems to me to be drawing a distinction between the factor of pain, of which discomfort is a lesser concomitant, and the factor of distress which may arise from other reasons than pain; distress may result of course from pain or discomfort, but may also result from breathlessness, which is another matter to which the Tribunal referred."

That passage is not free from difficulties of interpretation, but perhaps the important point is that Glidewell L J shows that "discomfort" and "distress" have different connotations. Wherever possible, findings should be related to the statutory test, or there is a danger of giving the appearance that a wrong legal test has been applied.

13. I have concluded that there was a further error of law in that the appeal tribunal did not deal adequately with the dates to which its findings related (one of the grounds on which the mobility allowance decisions in Kitchen were found by the Court of Appeal to be deficient). The appeal tribunal concluded that at all times since 18 January 1989 the claimant was capable of a significant degree of walking without severe discomfort. That was apparently based on the finding that throughout the period the claimant was able to walk for 66 yards (200 feet) before having to stop. Yet in the written submission made by Mr Lyons, which the appeal tribunal did not expressly reject, the claimant was recorded as saying, as at 27 February 1990, that he would have to stop at least once in walking 200 feet. The appeal tribunal either did not address the question, clearly raised by the claimant's evidence, of a worsening of the claimant's walking ability since 18 January 1989 or failed to explain why it rejected the claimant's evidence of a worsening.

14. For those reasons, the decision of 15 October 1990 must be set aside as erroneous in point of law. Consequently I do not need to deal in any detail with the other points raised in the submissions. In my view there was no necessity for the appeal tribunal to make specific mention of the claimant's bowel problem, when it was clear that what primarily limited his walking ability was pain in the back and legs. Nor did the reference to Commissioner's decision CM/47/1986 in the setting aside decision of 22 January 1991 indicate that the appeal tribunal of 15 October 1990 had taken that decision into account. The appeal tribunal which considered the setting aside application on 22 January 1991 was simply taking an over-wide view of the scope of regulation 11(1)(c) of the Social Security (Adjudication) Regulations 1986 (which is restricted to procedural irregularities: R(U) 3/89, R(SB) 4/90 and R(SB) 1/92) and indicating why it considered the appeal tribunal's decision of 15 October 1990 to be correct in substance.

15. Under section 48(5) of the Social Security Administration Act 1992, as modified by regulation 24(13) of the Social Security (Introduction of Disability Living Allowance) Regulations 1991, I only have power to refer the claimant's appeal to an adjudication officer for determination.

16. Directions to the adjudication officer.

The adjudication officer will be concerned with the entire period from 18 January 1989 down to the date on which he gives his decision. He must determine first whether the medical conditions for mobility allowance, as specified in regulation 53 of the Social Security (Adjudication) Regulations 1986, are satisfied on any dates during that period. If they are, he must then decide whether to award mobility allowance and deal with the effect of regulations 7 and 8 of the Social Security (Intrcduction of Disability Living Allowance) Regulations 1991 on any award. Since the errors of law which I have identified in the appeal tribunal's decision relate mainly to questions of findings of fact and reasons for decision it is not appropriate for me to give any directions on the substance of the issues before the adjudication officer beyond that of applying the approach set out in paragraphs 10 to 12 above on severe discomfort and dealing with the matters mentioned in paragraph 13.

17. Conclusion

The claimant's appeal is allowed.

(Signed) J Mesher
Commissioner

(Date) 27 January 1994