Rule of DATs – But see CM/406/92 + CSM/34/93

43/93

DGR/21/LM

Commissioner's File: CM/361/1992

SOCIAL SECURITY ACTS 1975 TO 1990

SOCIAL SECURITY ADMINISTRATION ACT 1992

CLAIM FOR MOBILITY ALLOWANCE

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. For the reasons set out below, the decision of the disability appeal tribunal ("the DAT") given on 22 April 1992 is not erroneous in point of law, and accordingly this appeal fails.

2. On 22 April 1992 the DAT decided that the claimant was not entitled to mobility allowance. They made the following findings of fact

> "The appellant claimed Mobility Allowance on 15.02.1991. On the 12.07.91 she was examined by a Medical Practitioner, who reported that the appellant was not unable to walk or virtually unable to do so.
> On the 17.09.91 the appellant was examined by a Medical Board who confirmed ..... the opinion of the Medical Practitioner. The appellant suffers from Osteo-arthritis to the knees, and a Calcaneus spur. She is able to walk slowly, although sometimes she has assistance."

The tribunal gave as the reasons for their decision the following

> "The appellant is not unable to walk or virtually unable to do so. Further, the Tribunal accepts, on the balance of probabilities, the medical evidence that the appellant can make progress on foot without severe discomfort, and do not consider that the exertion required to walk would constitute a danger to her life or would be likely to lead to a serious deterioration in her health. Regulation 3, Mobility Allowance applied."

I see nothing wrong in law with the tribunal's decision.

3. A disability appeal tribunal, unlike a medical appeal tribunal, are not an expert body, although they do have the benefit of guidance from one member who is a doctor. They are not permitted to carry out any medical examination, and accordingly have to reach their determination on such evidence as is before them. Where, as in the present case, they have the advantage of medical reports from a medical practitioner and from a medical board, they will rely heavily thereon. In the present instance both the medical practitioner and the medical board were satisfied that the claimant was not unable to walk or virtually unable to do so. They set out the tests that they had applied in considering the claimant's walking capacity and they described her medical condition. Using, then, their medical expertise, both the medical practitioner and the medical board were satisfied that the claimant was not virtually unable to walk, having regard to the distance over which she could make progress on foot without discomfort, the speed at which she could make progress on foot without discomfort, the length of time for which she could make progress on foot without severe discomfort, and the manner in which she could make progress on foot without severe discomfort. Moreover, they were satisfied that the claimant's physical condition as a whole was not such that the exertion required to walk would constitute a danger to her health or would be likely to lead to serious deterioration in her health. The question of deafness and blindness did not arise in the present case. In the light of their medical judgment, the tribunal not unnaturally reached the conclusion that the claimant did not satisfy the medical conditions for an award of mobility allowance, and decided as a result that she was not entitled to the allowance.

4. Somewhat surprisingly, the adjudication officer now concerned supports the appeal. In the course of his observations he proceeds on the basis that the tribunal were an expert body. This is a misconception. As stated above, although the tribunal do have the assistance of a doctor as a member, they are not the same as a medical appeal tribunal. Accordingly, where they have the benefit of medical reports on the claimant's walking capacity, it would, in my judgment, be very unusual for them to depart from the conclusion of the medical authorities as to the claimant's walking capacity. They will, of course, be concerned with such matters as whether or not the claimant had a fair opportunity of presenting his or her case to the relevant medical authorities or whether the latter properly construed the relevant regulations, matters which are clearly legal issues; but they will not be concerned with any medical judgment as to the claimant's physical abilities. Moreover they must assume, unless there is something to indicate to the contrary, that the medical authorities have taken into account all relevent medical considerations, and have given due weight to all the contentions of the claimant as to his or her medical condition. Further, as the tribunal cannot themselves test the claimant's walking capacity, normally they are in no position to give proper weight to further evidence presented to them by the claimant. Such

evidence should have been produced to the medical authorities. If, however, they entertain the opinion that the new evidence might, had it been presented to the medical authorities at the relevant time, have influenced their decision, they should adjourn their determination, and seek a further report from one or more of the medical authorities. If, in the alternative, they consider that such evidence would, on the balance of probabilities, have had no practical bearing on the issue, then they can proceed to a final determination.

5. In support of the appeal, the adjudication officer now concerned contends that the tribunal made no findings as to the alleged propensity of the claimant occasionally to fall. This would not seem to have been a matter raised before the medical authorities in this case, but such a propensity would seem to me to be normally irrelevant. Many people are liable to fall, but are still perfectly capable of walking. It would only be in the most extreme case that the propensity to fall was of such significance that it operated to render the person concerned virtually unable to walk. If this was the position, then the matter should have been ventilated before the medical authorities. Indeed, if a condition of this gravity existed, it is difficult to see how it would have escaped the attention of those authorities. But, in any event, in the present case there was nothing to suggest that any propensity to fall was a condition of this magnitude. Accordingly, there was no need for the tribunal in the present case to defer their judgment until the medical authorities had considered the claimant's alleged condition and determined whether it affected their previous conclusion.

6. The adjudication officer now concerned then goes on to submit as follows

> "12. Regulation 3(1)(a)(ii) of the Mobility Allowance Regulations 1975 clearly imports that a person may be forced to be virtually incapable to walk if he is limited in one or more of the various ways mentioned in that regulation in making progress on foot without severe discomfort. Consequently it is incumbent on the DAT to record findings on each of the factual tests in Regulation 3(1)(a)(ii). This premise is supported in Commissioner's decision CM 216/1988. It is submitted that the DAT have not provided a finding on each of the factual tests and these omissions constitute an error in law."

I totally reject that submission. All that the DAT were required to determine was whether or not the claimant qualified for mobility allowance. The medical practitioner and medical board made specific findings on all the matters referred to in their detailed reports, and in the light of their analysis reached the conclusion they did. The tribunal simply accepted their determination.

7. The next contention made by the adjudication officer now concerned reads as follows

"13. Although brevity does not of itself constitute an error of law it is submitted that a DAT are carrying out a judicial function and have the duty to evaluate all the relevant evidence, and to provide a statement of their reasons for decision including findings on all questions of fact material to it. The Chief Commissioner in CM/103/84 noted that failure by a DAT to make findings specifically with regard to a claimant's outdoor walking ability (no matter in what manner eg by an indoor test) they determine that ability was an error of law. It is submitted that the DAT in this case have recorded no findings specifically with regard to the claimant's outdoor walking ability and that this omission constitutes an error of law."

This criticism would seem to be more applicable, if applicable at all, to the old medical appeal tribunal who actually carried out the relevant test and in the light of it made the relevant determination. Now, the decision is made by a DAT, who do not carry out any medical examination. The medical findings of both the medical practitioner and the medical board proceeded on the basis that their findings related to the outdoor walking ability of the claimant, and certainly in the case of the medical practitioner, and by implication the medical board, the test was carried out in the open. Accordingly, there is absolutely nothing in the adjudication officer's submission.

8. The adjudication officer now concerned goes on to support the appeal on a further ground. She says

"14. It is further submitted that a person whose walking ability fluctuates may qualify for the allowance if <u>taken as a whole</u> her condition is such that she can be considered virtually unable to walk. It is submitted that the DAT have not recorded any findings on this point.

15. There was evidence before the DAT that the claimant had 'good days'."

I also reject that submission.

9. There is nothing strange in a claimant's condition varying from day to day. The medical authorities are perfectly well aware of that, and assess the claimant's condition on that basis. If at the time that they conduct their test, there is any assertion that the claimant's condition is atypical, they must, of course, bear that in mind and deal with it. In the present case, there was no such suggestion. Accordingly, the DAT were entitled to rely on the conclusion reached by the medical authorities.

10. It follows from what has been said above that I see no respect in which it can be said that the tribunal erred in point of law, and accordingly I have no hesitation in dismissing this appeal.

11. However, before leaving this matter, I should mention that support for an appeal from an adjudication officer, which is wholly without force, can only serve to give the claimant hope where there can be none, and to be the unnecessary cause of disappointment. Adjudication officers should, therefore, be cautious about giving support to an appeal unless they have really sound grounds for so doing.

(Signed) D.G. Rice
Commissioner

(Date) 2 June 1993